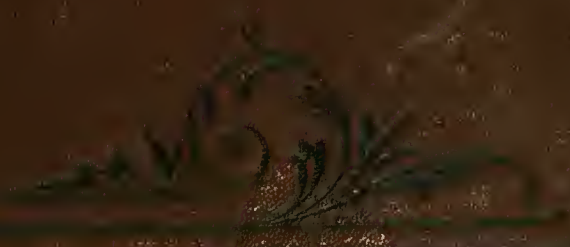
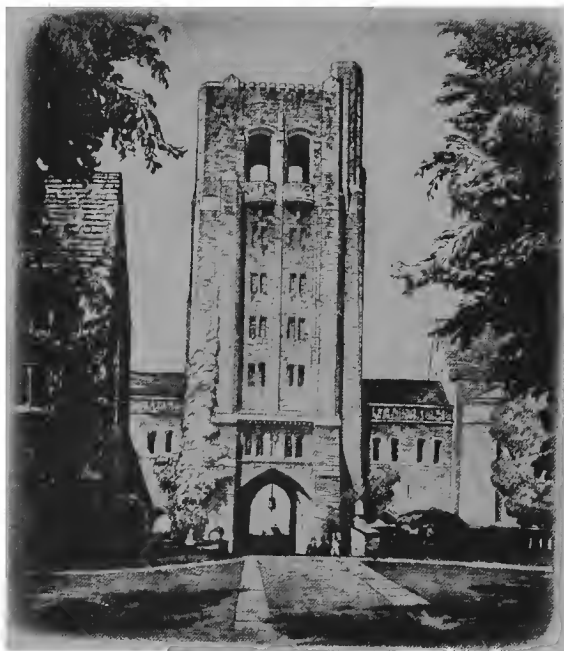


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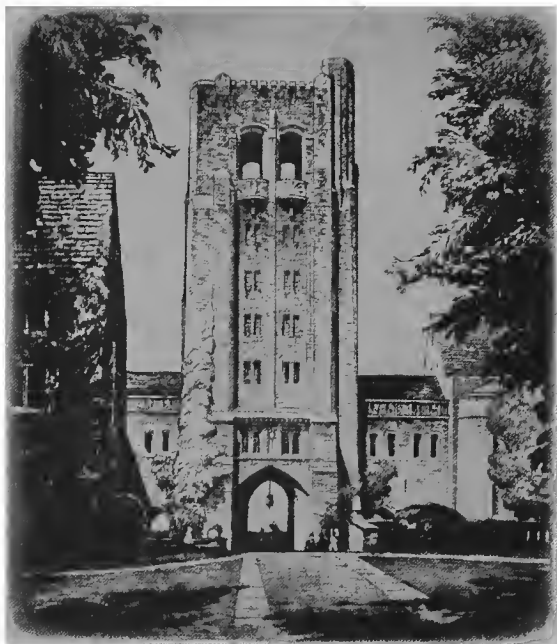
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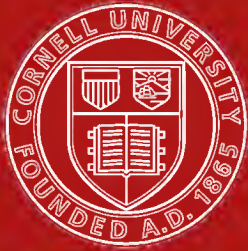
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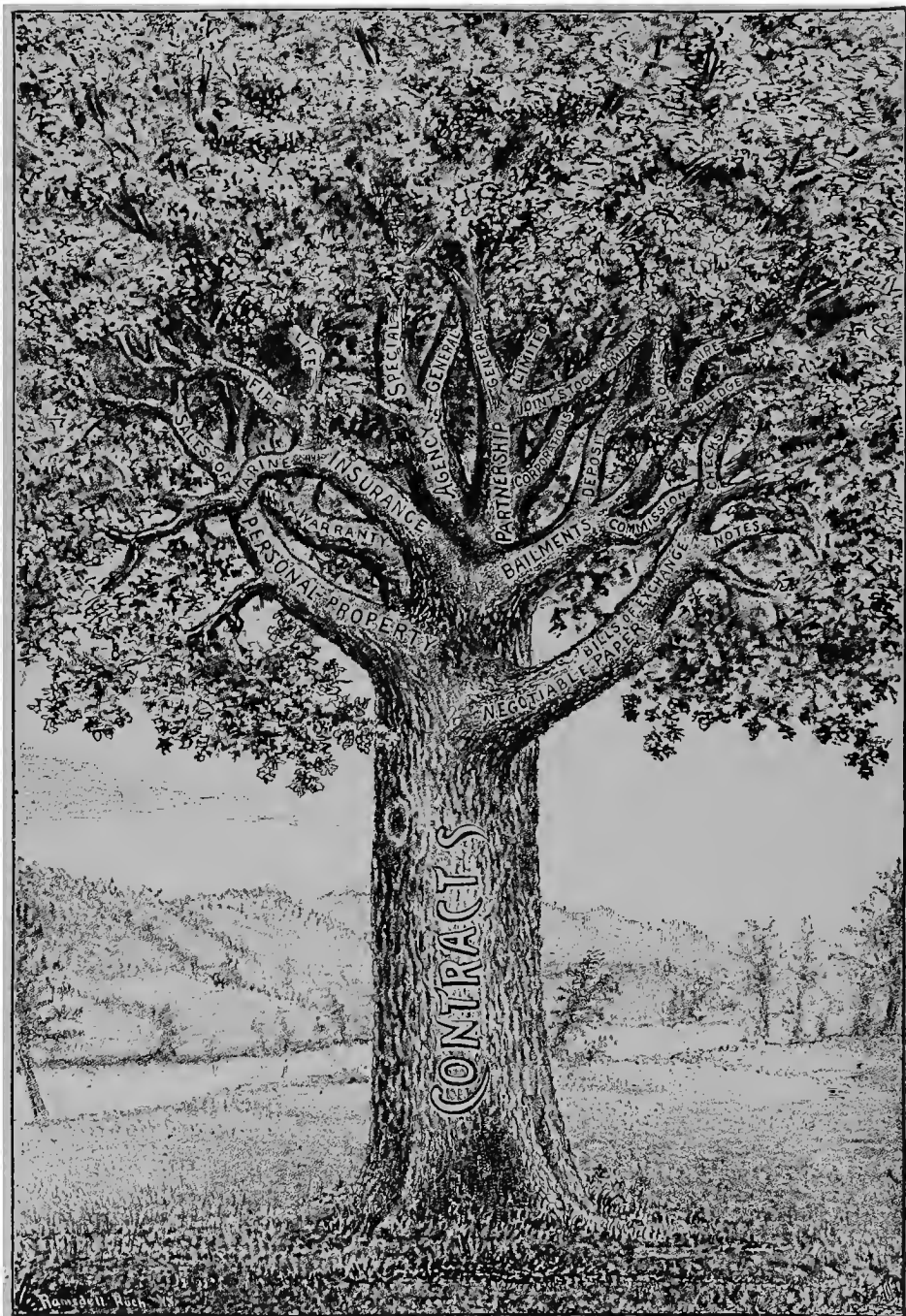
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A TREATISE
ON
COMMERCIAL LAW,

WITH
FORMS OF ORDINARY LEGAL AND BUSINESS DOCUMENTS, AND
COPIOUS QUESTIONS WITH REFERENCES.

DESIGNED FOR USE IN ALL SCHOOLS IN WHICH THE
COMMERCIAL BRANCHES ARE TAUGHT,

AND AS A
BOOK OF REFERENCE

FOR
BUSINESS MEN.

1889.

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PREFACE.

This treatise on Commercial Law has been prepared in recognition of what appears to its publishers a well-defined demand. Many other meritorious works upon this subject have preceded it, yet a large proportion of the teachers of the commercial branches have not found among them a book adapted, in all respects, to their wants. Effort has been made to ascertain the requirements of commercial teachers in this regard, and to faithfully and fully meet those requirements.

It is believed that the topics treated have been wisely selected; that the simple manner of discussing them, and the employment of common terms, will meet general approval; that the division of the work into lessons, and the arrangement of questions with references to the text, will be found of great convenience to both teacher and pupil; and that the brevity, yet singular completeness, with which every topic is discussed, will render it a peculiarly valuable text-book for the class of schools for which it is designed.

It seems unnecessary to urge the importance of instruction in the subject here treated. The confidence experienced by the business man who possesses such knowledge as this volume is intended to impart, and the doubts and dangers that constantly beset him who is not thus fortified, are well understood. The only questions remaining, then, for the consideration of the teacher are: What proportion of the pupil's time may be advantageously devoted to this subject; which topics shall be given greatest prominence; and how can such knowledge be most easily and certainly imparted? It is hoped that this book will aid him in wisely determining the answers to these questions.

CONTENTS.

	PAGE.
LAW, - - - - -	7— 10
PROPERTY, - - - - -	11— 13
CONTRACTS, - - - - -	14— 63
NEGOTIABLE PAPER, - - - - -	64—104
SALES OF PERSONAL PROPERTY, - - - - -	105—123
AGENCY, - - - - -	124—136
PARTNERSHIP, - - - - -	137—153
JOINT-STOCK COMPANIES, - - - - -	153—155
CORPORATIONS, - - - - -	155—167
GUARANTY AND SURETYSHIP, - - - - -	168—176
BAILMENTS, - - - - -	177—197
SHIPPING, - - - - -	198—204
INSURANCE, - - - - -	205—222
LIEN, - - - - -	223—225
INTEREST AND USURY, - - - - -	226—229
DOMESTIC RELATIONS, - - - - -	230—238
REAL PROPERTY, - - - - -	239—243
REAL ESTATE CONVEYANCES, - - - - -	244—257
LANDLORD AND TENANT, - - - - -	258—262
BUSINESS FORMS, - - - - -	263—282
GLOSSARY, - - - - -	283—290
INDEX (GENERAL), - - - - -	291—309
INDEX TO FORMS, - - - - -	310—311

INTRODUCTION.

LESSON I

LAW.

1. Definition. ¹In its broadest sense, a law is a *rule of action*. But this definition is too comprehensive for our purpose. ²We shall have to deal only with the laws of a State or nation, which are called *municipal laws*. ³These may be defined as the rules established by the supreme power of a state for the regulation of the actions of its inhabitants. ⁴In popular language, *law*, or *the law*, means the whole body of these rules in force in the State.

2. Universality of Law. ⁵It is impossible to imagine any organized society, however rude, without some laws. ⁶It follows, therefore, that every state or nation has its own laws, beginning with the establishment of the government, and improving and increasing as society advances. ⁷These laws are supreme within the boundaries of the particular country, so that a stranger happening within the country must obey them the same as a citizen, and all property within its borders is subject to the law of the land, no matter where its owner may reside. ⁸On the other hand, the laws of one state or country have generally no force or effect in another.

3. Sources of Law. ⁹In this country the people constitute the supreme authority, and we must look to them collectively for the establishment of the rules governing their conduct with each other. ¹⁰We thus find that, from time to time, by their duly constituted representatives, they have adopted constitutions—of the United States and the separate States; they have enacted statutes—in Congress and the State Legislatures; and they have given judicial decisions—by the United States and State courts. These together, form the great body of our law. ¹¹It is not, however, to be understood that such constitutions, statutes and decisions have to any very great extent originated law. ¹²They have adopted and declared the law already in existence. ¹³This law consisted in part of the statutes passed by the English parliament, but mainly of the *common law*.

4. The Common Law. ¹⁴The Britons, who were the early inhabitants of England, like all other primitive peoples, had their own customs, by which their intercourse one with another was regulated. ¹⁵As they advanced to the stage of organized government their customs received the sanction of the supreme authority of the land, and thus became laws. ¹⁶Subsequently the coun-

try was repeatedly invaded by other nations, and in several instances large numbers of the invaders remained in England, forming more or less friendly relations with the Britons. Sometimes they occupied distinct provinces or districts exclusively, and at other times they settled among the original inhabitants. They of course brought with them their own peculiar customs, and these either took the place of or mingled with and modified the laws of the Britons. "At length these different provinces became united under one government, and at once great difficulty arose on account of this diversity among their laws. After a time, out of these different systems a uniform body of law was established, common to the whole kingdom, and hence called the *common law*, to distinguish it from the local laws of the separate provinces. "It is therefore a body of law that had its origin in the customs of the different races from which sprang the English people.

¹⁹The *common law* is sometimes called the *unwritten law*, because, owing to the ignorance of letters among the early inhabitants of England, it was for a long time preserved only in memory. ²⁰The term *unwritten* has, however, in the strict sense of the word, long since ceased to be applicable, because the *common law*, as laid down by the courts of Great Britain and this country, has been written out and preserved in thousands of volumes of reports.

5. Statute Law. ²¹A statute is an act of the legislature. ²²It is a law formally written out and passed by a legislative body, like the English Parliament, the Congress of the United States, or the Legislature of a State. Statute law is sometimes called the *written law*, to distinguish it from the *common* or *unwritten law*. ²³While there are other and higher laws in this country, as we shall see, yet the statute and common law provide nearly all of those rules of action which together constitute COMMERCIAL LAW.

6. Uniformity of Law in the United States. ²⁴This country was largely settled by English people, who formed themselves into colonies under the authority of the government of Great Britain. They brought their laws with them, as they did their household goods, and applied them at once to the regulation of their intercourse. Thus was the *common law* laid at the foundation of our legal systems. ²⁵At length these colonies renounced allegiance to the British crown, declared themselves independent States, and for their fundamental law adopted the *common law* and such of the English statutes then in force as were applicable to their situation.

Subsequently they united in forming the government of the United States of America. ²⁶In so doing they ceded to the federal government certain powers, with regard to which its authority should thereafter be supreme, but in every other respect the States severally retained their sovereign powers.

²⁷The result is that our States, except as to matters pertaining to the general government, are, in respect to each other, quite like foreign countries, the law of one having, generally, no binding force within another. ²⁸This of course includes nearly the whole field of *commercial law*, and it would, therefore, seem that a work of this kind would be of no value except in some particular State for which

it might be written. ²⁹And such would be the case were it not for the fact already referred to, that all the States, except one, have adopted as their fundamental law the old *common law* of England. This, with some minor exceptions, to which reference will occasionally be made in subsequent pages, has resulted in great uniformity in the laws of the States, especially in regard to the department of law under consideration in this book. ³⁰The exception above referred to is the State of Louisiana, whose law is founded upon the Roman or civil law.

— **7. Relative Authority of the Laws.** ³¹As has been said, certain powers were delegated by the States to the general government at the time of its formation, with regard to which its authority is supreme. ³²This was done by means of the Constitution of the United States, which was adopted by the original States of the Union, and has since been ratified by all the States subsequently admitted. ³³Hence this constitution, with regard to all matters contained in it, is the highest law of the land. ³⁴It provided, among other things, for the formation of a legislative body authorized to pass proper laws regulating the exercise of their constitutional powers; ³⁵and therefore, the acts of Congress are next in authority to the Constitution itself. ³⁶The States, however, while they delegated certain powers to the federal government, retained supreme authority over all other matters. ³⁷Hence, in regard to these, the Constitution of each State is its highest law. ³⁸Then next in authority stands the statutes passed by its legislature. ³⁹And last of all the common law.

⁴⁰It is not to be understood from this that the common law is less binding where it has not been abrogated, than the other laws referred to, but simply that it must give way to any of them in case of conflict.

⁴¹The conclusion therefore follows, that the *common law* is the fundamental law of the land, and prevails in all cases where it has not been abrogated by a statute or by some constitutional provision.

8. Law and Property. ⁴²A people so uncivilized as to have no form of government, cannot be said to have any laws; but as they advance, customs are slowly formed, and these, as has been indicated, are established as laws, with the organization of a government. ⁴³Such laws must, however, be comparatively few, because there is little to regulate in early stages of society except personal intercourse, and a small number of rules is sufficient for that purpose. But when the rights of property become well recognized, and the kinds of property are multiplying, the development of the law is rapid, keeping pace with this growth. ⁴⁴Hence it is the rules prescribed by the supreme authority of a state or nation, regulating the actions of its inhabitants *in regard to property rights*, that are much the most numerous; ⁴⁵and therefore the great body of our municipal law may be said to be the law of *property*.

LESSON REVIEW.

1. What is a *law*?
2. What are *municipal laws*?
3. Define *municipal law*.
4. What is meant by *the law*?
5. Can there be an organized society without laws?
6. How does this result in the case of any state or nation?

7. What authority have the laws of a country within its boundaries, and how do they affect strangers, and their property? 8. Have the laws of one country any force in another? 9. Who constitute the supreme authority in this country? 10. How have the people prescribed the rules forming the body of our law? 11. Have they thus originated law? 12. How then did they procure the law? 13. Of what did the existing law thus adopted consist? 14. How are the relations of primitive peoples regulated? 15. How do these customs become laws? 16. What is the explanation of the early diversity of the laws in England? 17. How did this result in the establishment of the *common law*? Why was it so-called? 18. Give a general definition of the *common law*. 19. By what other name is it sometimes called? 20. Why is that name not now strictly appropriate? 21. Define a statute. 22. Give a further explanation. 23. Where shall we look for the rules constituting *commercial law*? 24. How was the *common law* brought to this country? 25. How did it come to be the fundamental law of the States? 26. What was done by the States in forming the United States Government? 27. What relation do the States sustain to each other? 28. What apparent effect would that have in regard to a work of this kind? 29. Why is this effect apparent only and not real? 30. What one of the States did not adopt the *common law*, and upon what is its legal system founded? 31. With regard to what is the authority of the general government supreme? 32. By what means did the States delegate these powers to the general government? 33. What rank among our laws does this give the constitution? 34. What did the constitution provide in regard to legislation? 35. What authority have the acts of Congress? 36. As to what matters do the States possess supreme authority? 37. What is the highest law of the State? 38. What law ranks next to it in authority? 39. What position does the common law occupy in respect to the Constitution and statutes? 40. How is this to be understood? 41. What conclusion follows? 42. Can a people without any form of government be said to have laws? 43. Why are the early laws of a people comparatively few? 44. What rights do the laws of a state mainly regulate? 45. What then may the great body of municipal law be said to be?

LESSON II.

PROPERTY.

1. Definition. ¹An Indian goes into the forest, cuts sticks of the proper kind and length, peels bark from the white birch trees, and out of these he slowly fashions a canoe. He may then sell it, or trade it for cloth and ammunition. We say it belongs to him—that it is his property. But the wood and bark he found growing, and it was worth nothing; yet the finished boat has a price—he can sell it for money. ²His labor, then, has not created the materials, but it has created *value*. ³Hence property is sometimes said to be the produce of labor. ⁴His labor has given him the *right* to use and enjoy the canoe, and he may not only sell or exchange it, but he may give it away or sink it in the river, and no one can hinder him from disposing of it as he pleases. ⁵In like manner, one who has purchased a farm may erect such buildings and raise such crops upon it as he chooses. ⁶This suggests the usual legal definition of property, which is “The right and interest which a man has in lands and chattels, to the exclusion of others.” ⁷In popular language, however, *property* means the thing itself, rather than some *right* in it which the owner possesses; it means the canoe, rather than the Indian’s right in it; it means the farm, and not the owner’s technical right in it.

2. Division of Property. ⁸From the preceding section it appears that property must comprise everything which it is possible for a person to own. This includes a vast range of things, which are capable of being grouped under various titles; but for the purposes of this work property may be divided into—

1. Personal property. { 1. Things in possession.
2. Things in action.
2. Real property.

3. ⁹Personal Property consists of such things as are movable, and may be taken by the owner wherever he goes; that is, they may go with him *personally*, or attend his *person*, and hence are called *personal property*. ¹⁰The terms *goods*, *chattels* and *effects* are often used together to denote personal property of all kinds. Originally they were applied to different classes of property, but these distinctions are now not much considered.

¹¹Under the common law all vegetable growths, such as trees, grass and growing crops, while attached to the soil were considered a part of the *realty*, that is, of the real property or land out of which they grew, but the moment they were severed from the soil they became personal property. ¹²In some States this rule of law has been so modified that annual crops, growing from seed sown or planted, are considered for some purposes personal property.

¹³There are certain interests in lands that are considered in law as personal

property. ¹⁴These are called *real chattels*, to distinguish them from *personal chattels*, ¹⁵such as household goods and wearing apparel. The most familiar example of a real chattel is a lease for years, that is, the interest one has in real property by reason of holding a lease of the same for some definite number of years.

¹⁶*Good will* is another kind of personal property, to which special reference must be made. ¹⁷It has been said that it consists in "the probability that the old customers will resort to the old place." ¹⁸A shoe dealer, we will suppose, has conducted business continually at the same store in some city for thirty years. As a result, large numbers of customers have grown into the habit of going to that particular place of business to make all their purchases in the line of goods there sold. Now if the merchant should sell to some one who would carry on the same business, many of these customers would probably continue to patronize the old place. The merchant, knowing this, adds some hundreds of dollars to the inventory of his stock and fixtures, which additional sum the new proprietor pays for the *good will* of the business.

¹⁹Mercantile transactions are almost wholly confined to personal property, and hence the rules of law applicable to this class of property constitute the main body of commercial law.

4. Things in Possession. ²⁰All personal property of which one has the actual possession, such as money, wagons, domestic animals and the like, are called *things in possession*, ²¹or *choses in possession*.

5. ²²Things in Action, or *choses in action*, comprise such kinds of personal property as are not really in the possession of the owner. ²³A music dealer owns a piano standing in his salesroom. It is a chose in possession. He subsequently sells and delivers it to a customer for six hundred dollars, and takes his note for the amount, or charges him with it upon his books. In either case he does not get the money, which he expects to get eventually, and hence he does not have it *in possession*; but he does have a right to sue, or bring an action against the purchaser, and obtain the money if it should not be voluntarily paid when due. ²⁴His property in the money, then, rests in his right of action, and therefore the note or book account is called a *thing* or *chose in action*.

6. ²⁵Real Property is that which is fixed or immovable, and includes land and whatever is erected or growing upon it, with whatever is beneath or above the surface. ²⁶This comprises all buildings and improvements of a permanent character, as well as trees growing upon the land. ²⁷Buildings, are, however, sometimes erected for temporary uses, or trees are grown with the purpose of removing them for nursery stock, and in either case they do not become any part of the realty.

LESSON REVIEW.

- 1 Illustrate what is meant by *property*.
2. What does labor create?
3. What, therefore, is property sometimes said to be?
4. What has the Indian's labor given him?
5. What similar right does the ownership of land

give? 6. Give the usual legal definition of property. 7. What is the popular meaning of the word? 8. How may property be divided? 9. Of what does personal property consist, and what is the reason for the use of the term *personal*? 10. What terms are sometimes used to denote personal property? 11. When, under the common law, were vegetable growths real and when personal property? 12. How has the rule been modified? 13. Are there any interests in lands which are personal property? 14. What are they called? 15. Give an example of a *real chattel*. 16. Name another kind of personal property requiring special reference. 17. In what is it said to consist? 18. Give an illustration. 19. What kind of transactions do the rules of commercial law mostly concern? 20. What are *things in possession*? 21. By what other name are they known? 22. What kinds of property are comprised under the term *things in action*? 23. Give an illustration containing examples of a *chose in possession* and *choses in action*. 24. Why is the term *thing* or *chose in action* applicable to such kinds of personal property? 25. What is *real property*? 26. What does it comprise? 27. What exceptions may there be to this rule?

LESSON III.

CONTRACTS.

1. The Extent of Contracts. ¹Contracts form the massive trunk which supports, and out of which grow all the branches of *Commercial Law*. And although these branches subdivide into the slender twigs of special laws applicable only to particular cases, yet the sap and fibre of the trunk is traceable in them to the farthest bud. ²The leaves and fruit of the tree represent the whole volume of the world's business, nourished and sustained by the law of contracts. ³The hunter sells a deer skin : it is a contract. The farmer buys a horse : it is a contract. The merchant hires a clerk ; by and by they form a co-partnership ; they borrow money at the bank ; to enable them to do so, a friend indorses the note : each is a contract. A railroad company agrees to carry a million bushels of wheat from Chicago to New York : it is a contract. The United States government buys Alaska : it is a contract. And so it appears that the range of the law of contracts must extend from the smallest, through all intermediate, to the greatest transactions, and include them all.

2. Definition of Contract. ⁴In its largest sense the term *Contract* includes every description of agreement, obligation, or legal tie, whereby a party binds himself ; but this comprehends more than is implied in the common use of the word. ⁵In its usual and more restricted meaning in the law, a contract is an agreement of two or more persons, upon a sufficient consideration, to do or not to do some particular thing.

3. Division of Contracts. ⁶Contracts are divided into,

1. Contracts by *Specialty*, always written.
2. *Parol* Contracts, either

{	1. <i>Written</i> , always <i>express</i> , or				
{	2. <i>Oral</i> , either <table style="display: inline-table; vertical-align: middle;"> <tr> <td style="font-size: 2em; vertical-align: middle;">{</td> <td>1. <i>Express</i>, or</td> </tr> <tr> <td style="font-size: 2em; vertical-align: middle;">{</td> <td>2. <i>Implied</i>.</td> </tr> </table>	{	1. <i>Express</i> , or	{	2. <i>Implied</i> .
{	1. <i>Express</i> , or				
{	2. <i>Implied</i> .				

4. Contract by Specialty. ⁷A *contract by specialty*, or a *specialty*, as it is briefly called, is a contract under seal : the familiar examples are bonds, mortgages and deeds. ⁸The seal now commonly used is a piece of colored or gilt paper of any shape one may fancy, attached to the document immediately after the name of the person signing the same, though in some States a simple device or scroll, printed or made with the pen, is all that is required ? ⁹It is a relic of the days when men spent their lives in fighting : when warfare was the only honorable calling ; learning to read and write was considered a waste of time, and to be able to sign one's name a species of disgrace. Hence, when one of those fierce old warriors wished to execute a contract, he placed upon it the

impress of his seal in melted wax. The custom, in a modified form, remains, while the reason for it no longer exists, and has been almost forgotten.

¹⁰ The seal is said now to indicate deliberation and a certain solemnity in the execution of a document, so that the person who has signed it is presumed to have done so with full knowledge and a perfect understanding of its contents; and he can never afterwards claim a want of consideration, that is of some price or inducement for his agreement. Hence, a contract under seal—a *specialty*—is said to imply a consideration. ¹¹ It follows then, that if there be a consideration it need not be expressed, and more than that, *there need be no consideration*. There is but one other class of contracts in which a consideration is not necessary to their validity, and then only under certain circumstances. It is where a promissory note or other negotiable paper, given without consideration, has been transferred, before it became due, to a person who paid for it and did not know of the want of consideration. *A specialty is always written.*

5. Parol Contracts. ¹² A parol contract is any agreement not under seal; and as the great bulk of the business of the world is controlled by this class of contracts, they will be mainly treated of in this work. ¹³ A *parol* contract may be either *written* or *oral*.

6. Written Contracts. ¹⁴ It is not to be understood that a *written* contract necessarily means one that has been written out upon paper, with a pen or pencil, for it includes as well those that are printed. Although these are the only ones we have to deal with practically, yet an agreement expressed by signs or symbols in printing or engraving, or cut in wax, or stone, or metal, would be equally a written contract; and all of these forms have been used at various stages of the world's progress.

7. ¹⁵An Oral Contract, is an agreement made by means of spoken words. These, as we have seen, may be either *express* or *implied*.

8. ¹⁶An Express Contract, is one in which the terms are distinctly stated, or, in other words, the things to be done by both parties are definitely declared. ¹⁷ A furniture manufacturer agrees with a lawyer that he will make a cherry desk for him, of a certain size, shape and finish, and deliver it at his office on a certain day, for forty-five dollars, which the lawyer promises to pay. It is an *express* contract.

9. Implied Contract. ¹⁸ There is some confusion in the use of this term, but it is generally applied to a certain class of contracts, properly *express*, in which one or more of the promises are signified by other means than by words. ¹⁹ If the lawyer simply orders a good office desk made for him, without any *express* agreement as to price, there is an *implied* promise on his part to pay for it when finished, what it is reasonably worth. It is an *implied contract*, as the words are commonly used.

10. Frequency of Implied Contracts. ²⁰ In actual business very many of the contracts involving minor matters have one or more of their stipulations

implied. In fact there may be said to be an implied agreement in every express contract, that the parties will do whatever the law requires of them in carrying out the terms and fulfilling the conditions really expressed.

11. Executed and Executory Contracts. Contracts are either executed or executory. ²¹A person goes to a jeweller's, asks the price of a watch, pays the money, and takes it. This is an *executed* contract, that is, it is *finished*. ²²Hence an *executed contract* is one in which nothing remains to be done by either party, and where the transaction is completed at the moment that the agreement is made. ²³On the other hand an *executory contract* may be said to be an *unfinished* contract: one that is to be executed at some future time. The illustrations given in the preceding sections (8 and 9) are examples of executory contracts.

The definition of a contract already given defines an *executory contract*; and as most of the practical questions of law, arising in the usual course of business, concern this class of contracts, they will mainly claim our attention in the succeeding pages.

12. Necessary Conditions. ²⁴The validity of a contract depends upon the existence of four necessary conditions. ²⁵These are:

1. Parties legally capable of contracting.
2. The consent of the parties.
3. A lawful consideration.
4. The subject-matter.

LESSON REVIEW.

1. What relation do the different branches of commercial law bear to contracts? 2. How further illustrated? 3. Give examples of contracts. 4. Define *contract* in its largest sense. 5. Give its meaning as defined in the law. 6. How are contracts distinguished? 7. What is a *specialty*? 8. What is a *seal*? 9. Give its origin. 10. What does it imply? 11. What two features distinguish a specialty? 12. What is a *parol* contract? 13. How does it differ from a specialty? 14. What is meant by a *written contract*? 15. What is an *oral contract*? 16. What is an *express contract*? 17. Give an illustration. 18. What is an *implied contract*? 19. Give an illustration. 20. May a contract be partly *express* and partly *implied*? 21. Give an example of an *executed contract*. 22. Define it. 23. What is an *executory contract*? Give original examples. 24. Upon how many *necessary conditions* does the validity of a contract depend? 25. What are they?

LESSON IV.

PARTIES.

1. Legal Capacity. ¹Persons who are under any natural or legal disability cannot make a valid contract. ²All other persons have the largest liberty in contracting, and may enter into any and all contracts, except only such as are illegal. Corporations, which are considered in law as artificial persons, may contract only within the limits of the power given to them by their charters or the statutes of the States in which they were incorporated.

2. Incompetent Persons. The persons who are thus incompetent to contract, under some or all circumstances, are:

- | | | |
|--|------------------|---------------------|
| 1. ³ By reason of natural disability. | ⁴ { | 1. Idiots. |
| | | 2. Lunatics. |
| | | 3. Drunken persons. |
| 2. ³ By reason of legal disability. | - ⁵ { | 1. Infants. |
| | | 2. Married women. |
| | | 3. Alien enemies. |

3. Idiots. No one can make a valid contract who is incapable of comprehending the nature and effect of his agreement. ⁶An idiot being so deficient in intellect that he is incapable of doing ordinary business or understanding the common affairs of life, it therefore follows that he is incompetent to contract.

4. Lunatics are persons who have lost their reason, and hence have no contracting capacity. ⁸They cannot bind themselves by contract; but in order to relieve a lunatic from the obligation of his contract his insanity must be shown by legal evidence, because, being unusual, its existence will not be presumed. Hence the contracts of a lunatic, on their face, are valid, when made before the fact of his insanity has been established by legal proceedings. ⁹These contracts are only *voidable*; that is, they remain in full force and effect until something is said or done to render them void. ¹⁰But only the lunatic or his legal representatives can avoid such a contract. The other party to the contract is bound by it the same as though he were dealing with a competent person, and cannot take advantage of the disability of the lunatic to avoid his obligation. ¹¹When, however, there has been a legal inquiry and the fact of insanity properly established, then all contracts afterward made by the lunatic will be wholly *void*. ¹²There is this exception to the general rule that a lunatic's contracts are either *void* or *voidable*, viz: when the contract is for necessities suitable to the lunatic's condition the law will hold it to be valid.

¹³There are cases of lunacy in which the person afflicted, from time to time, becomes sane for a short period. These periods are known in law as *lucid intervals*, and contracts made while they last are valid.

5. Drunken Persons. ¹⁴Intoxication invalidates a contract only when it is so complete that the person is deprived of capacity to act. This occurs when he is so drunk that he has no use of his reason. Partial intoxication does not

render one incapable of making a contract; ¹⁵ but the fact is always material in cases where the intoxicated person has been defrauded.

Where a person is prosecuted for a criminal act, drunkenness is not a defense, though in case of conviction it may operate to lighten the punishment.

¹⁶ After a person has been found by due process of law to be an *habitual drunkard*, and his property placed in the hands of a guardian, he is no longer able to make a binding contract.

¹⁷ The same exception as to contracts for necessities exists here as in cases of lunacy.

6. ¹⁸ Infants, as legally defined, are persons under twenty-one years of age, but outside of law books such persons are usually called *minors*. ¹⁹ The law is very careful, as has already appeared, of the rights of those who are incapable of caring for themselves or protecting their own interests, and this great safeguard of freedom from liability under their contracts is thrown about them as a defense against evil and designing persons. Children are so incompetent, because their minds are immature. They have not reached that degree of understanding and experience that will enable them to guard against imposition; but, owing to the great difference among children in coming to maturity, it became necessary to fix arbitrarily an age at which they should be legally presumed to be able to care for themselves and protect their interests. The law has, therefore, established such age at twenty-one years. ²⁰ The statutes of a few States have changed this in the case of females, so that they become of age at eighteen, or at the date of marriage. ²¹ The *minor* becomes of age on the day preceding his twenty-first birthday. The explanation of this is that the law is said to take no account generally of fractions of a day. If then, for example, a child had been born at any hour of the 10th day of March, 1866, under this rule the whole day would be counted, and the full twenty-one years would be completed at the last moment of the 9th day of March, 1887; but here again the same rule applies, and the first moment counts the whole day, the same as the last. Hence a child so born would have become of age at a minute, or even a second, after twelve o'clock in the morning of March 9th, 1887.

7. Ratification. ²² An *infant* cannot bind himself by a contract. He may make a contract that is voidable only, ²³ and after coming of age he may ratify it, thus making it as valid as though executed after he became of full age. This ratification, however, really amounts to a new contract. ²⁴ He may so ratify his contract in three ways, viz: (1) by expressly recognizing it as valid; (2) by part performance; and (3) by retaining the benefit or proceeds of it.

8. Disaffirmance. An infant has a reasonable time after coming of age in which to declare his *executory contract*, made during minority, void. ²⁵ Where he rescinds an *executed contract* he must restore to the other party whatever consideration he may have received, *if it be within his power to do so*. ²⁶ Thus, if he has bought a horse, and wishes to avoid the purchase and recover the price paid, he must first restore the animal to the former owner in as good condition as at the time of sale. If, however, the horse has died, so it is no

longer possible for the infant to make such restoration, he can, nevertheless, rescind the contract and recover the purchase price.

9. ²⁷The Defense of Infancy is a personal privilege, and no one except the infant and his representatives can take advantage of it; and so jealously does the law guard this right that it will not permit the infant to waive it by any possible form of agreement. ²⁸He cannot appoint an agent or attorney, who is a competent person, and through him make a valid contract; though acting as an agent himself, he can bind his principal by contract; ²⁹but the adult party contracting with an infant cannot raise the question of his minority or take advantage of it. As in the case of a person dealing with a lunatic or drunkard, he is bound by his agreement. ³⁰Hence, where mutual promises to marry have been made between a minor and an adult, the minor may sue and recover for breach of promise, but the adult cannot.

10. Exceptions. ³¹An infant's contracts for necessities furnished him, which are suitable to his state and condition in life, are binding upon him. ³²They are not, however, binding to the extent of any exorbitant prices he may have agreed to pay, but only for the actual value of such necessities; but this exception does not apply in the case of an infant living with his parents, who support him, or having a guardian who is able and willing to do so.

What constitutes *necessaries* depends in each particular case upon the circumstances of the infant at the time in question. ³³In general, necessities are, (1) board, (2) clothes, (3) medical attendance, and (4) schooling; but the quantity of each and the amount to be properly expended therefor will be largely determined by the infant's mode of life and financial prospects.

It is to be remarked, however, that infants, as well as lunatics and drunken persons, are liable for their wrong doing, and are answerable civilly for trespass and assault.

11. Married Women. ³⁴Only women whose husbands are living will be here referred to as *married women*. A widow can contract, the same as a man or an unmarried woman. Under the common law, married women were not competent to contract. ³⁵This is known as the disability of *coverture*. ³⁶The theory out of which this rule of law grew was that husband and wife constituted but one legal person, and that person was the husband; that the moment a woman was married her legal personality was merged in that of her husband. All her personal estate passed directly to him, and he became liable for her debts contracted before marriage.

But the common law in regard to married women has been greatly modified by statute in most of the states, and the general tendency is toward greater modification of the disabilities of coverture. ³⁷Even now, in nearly all of the states, a married woman may have and control a separate estate, and may carry on business apart from her husband; and, as an incident of the management of such business and property, may make valid contracts. Under the common law, a married woman, though she could not contract for herself, could, like an infant, act as the agent of a competent person and bind him by contract.

12. Alien Enemies. ³⁸In case two countries are at war, the subjects of either one are alien enemies to the citizens of the other. One of the well recognized laws of nations is that war suspends all intercourse with the enemy. It therefore prohibits all commerce between the subjects of the hostile governments, and renders their contracts illegal and void. ³⁹The reason of this is, that if friendly or business intercourse were permitted between the citizens of nations at war with each other, there would result a diversity of interests between the government and its subjects. A manufacturer of one country might be making large sums of money by furnishing a merchant in the other country with the products of his factory, the demand for which had been caused by the war and would cease with its close. Manifestly then, the interests of the manufacturer would be benefited by a continuation of hostilities, and might lead him not only to refuse aid to his own government, but actually to assist the enemy.

This rule has been applied to contracts made between residents of the Northern and Southern States during the late war.

13. Corporations. The power to contract is not confined to natural persons, and hence the subject of *parties* would not be complete without reference at this point to *corporations*, the general subject of which will be more fully treated in another part of this work. ⁴⁰A *corporation* is defined as an *artificial person*. It is a creature of the law, and has such powers, and only such, as are given to it by statute. ⁴¹Among these is the power to contract within the limits of its prescribed authority, as fully and freely as a natural person could.

LESSON REVIEW.

1. What persons cannot contract ?
2. How far does the right of competent persons to contract extend ?
3. Give the two main divisions of disability.
4. What classes of persons are incompetent by reason of *natural disability* ?
5. What classes by reason of *legal disability* ?
6. Why is an idiot incompetent to contract ?
7. What is a lunatic ?
8. What must be proved to relieve a lunatic from his contract, and why is such proof necessary ?
9. What is meant by saying a lunatic's contract is *voidable* ?
10. Who may and who may not avoid such contract ?
11. When are a lunatic's contracts void ?
12. Give the exception.
13. What is meant by *lucid interval*, and what effect has it upon the contracts of a lunatic ?
14. What degree of intoxication of a party invalidates a contract ?
15. When is the question of partial intoxication material ?
16. When are a drunkard's contracts void ?
17. Is there any exception to the rule, and if so, what ?
18. Give the legal definition of an *infant*.
19. What is the policy of the law in regard to infants ?
20. What exceptions are there to the rule that infants become of full age at twenty-one years ?
21. When is an infant said to be twenty-one years of age, and what is the explanation of it ?
22. May an infant ratify his contract ?
23. When ?
24. How ?
25. What must he do in case he wishes to rescind an *executed* contract ?
26. Give an example ?
27. Who may set up the defense of infancy ?
28. Can an infant make a valid contract through an agent ?
29. Can the

adult party to a contract take any advantage of the infancy of the other party?
 30. Give an illustration? 31. What exception is there to the rule that an infant's contracts are not binding? 32. How is the exception qualified?
 33. What are *necessaries*? 34. What women are incompetent to contract?
 35. What is this disability termed? 36. What is the theory upon which this disability rested?
 37. In what respects has this disability been modified in most of the States? 38. What is an alien enemy? 39. Why is business intercourse with alien enemies prohibited? 40. How is a corporation defined?
 41. Has it the same liberty of contracting as a natural person?

LESSON V.

CONSENT.

1. Mutual Assent. ¹The second condition of a valid contract is, that the parties must assent to the same terms in the same sense—their minds must meet. This constitutes *mutual assent*, ²which is resolvable into two elements, viz.

1. Proposition.
2. Acceptance.

2. A Proposition is the initiative of a contract. ³An art dealer says to a customer, "I will sell you this engraving for twenty-five dollars." That is a *proposition*, or offer; ⁴but it is not binding, and may be withdrawn the next instant, or at any subsequent time before *acceptance*. The offer may be made by either party. If the customer considers the price asked too high, he may say, "I will give you twenty dollars for the engraving." This also would be a *proposition*—the *initiative* of a another contract; but like the former offer, without effect until accepted.

3. ⁵Acceptance of the *proposition* completes the *assent*; but it must be as broad as the terms of the offer. A qualified acceptance is no acceptance. ⁶If the customer were the proprietor of a coal yard, and should say to the art dealer, "I will take the engraving at your price, but you must let me deliver you two tons of coal in part payment," it would not be an acceptance. It would be, in fact, a refusal of the first offer and a new proposition.

⁷The *proposition* and *acceptance* may be either *oral* or *written*, or one may be oral and the other written; and the acceptance may be even indicated by signs, or in any other manner whereby the fact can be unequivocally made known. There are, however, certain contracts, as will hereafter appear, that must be wholly in writing.

4. Time is often an important factor in *assent*. ⁸Where the offer is oral and does not include any provision as to time of acceptance, it should be accepted immediately, because it may be withdrawn at any moment, and, if the parties separate, the offer ceases.

⁹ When a time is fixed by the terms of the offer, at, or within which it must be accepted, there must be a strict compliance with such provision. If an offer be made by letter, requiring an answer by return mail, a later acceptance will not create a contract.

¹⁰ Where the offer is made by letter, some time must necessarily elapse before it can be accepted; and the offer, in the meantime, continues perhaps for days, or even weeks, but the moment the letter of acceptance is mailed the contract is complete. ¹¹ Hence it follows that even if the letter is lost or destroyed after it is mailed, and so not received, yet the contract has been completed and the parties are bound.

5. Illustrations. A grain factor at Chicago writes to a miller in Rochester on the 10th day of January, offering to sell him five thousand bushels of wheat at eighty-seven cents per bushel. The miller receives the offer January 12th, and on the evening of the same day mails a letter, post-paid, and properly addressed, to the factor in Chicago, containing his acceptance, and from that moment the contract is binding. On the 11th of January, the factor, concluding he does not wish to sell wheat at that price, writes and mails to the miller another letter, withdrawing his offer of the day before. This letter was written and mailed twenty-four hours before the offer was actually accepted, but it does not release the factor because it was not received until after the acceptance was mailed. In such cases, the person receiving the offer has a right to presume it is continuing, until he is actually notified of its withdrawal. The factor might have telegraphed his revocation of the offer and thus prevented its acceptance.

6. Implied Assent. ¹² It is not necessary to the validity of a contract that the assent be *express*. In fact it is in a great many cases *implied*. ¹³ Where it is in the line of reason and justice the law will always *imply* the assent. In general, where services of a beneficial nature are rendered, or anything of value is furnished to another, the law *implies* the formal promise to pay what they are reasonably worth. When one requests a laborer to work in his field, or a merchant to send him goods, his engagement to pay a fair price for the same is *implied*. The law gives the laborer and the merchant a right of action against him, and the jury will determine what the labor and the goods are reasonably worth. A husband is bound to provide food and clothing for his family, and, therefore, his assent is presumed to purchases made by his wife for such domestic uses.

¹⁴ But the law does not imply a promise to pay for services gratuitously rendered, as in saving property from loss by fire; or rendered without request; or under such circumstances that no contract can be fairly implied.

7. Duress. The *assent* of the parties must be freely given. ¹⁵ Hence *duress* avoids a contract. One who is illegally imprisoned or threatened with great bodily harm, is under *duress*. Where one is legally imprisoned and his confinement properly conducted, it does not avoid his contracts, nor will the fear of such imprisonment. ¹⁶ But a contract has been held void which a married woman

was forced to sign by threats to arrest and imprison her husband on a criminal charge. In like manner, money may be recovered where the payment of it has been illegally compelled.

8. Mistake. ¹⁷The law does not allow very much latitude for mistakes, though where a contract is based upon a mutual mistake of fact, it is not binding. There has been no *assent*. ¹⁸A forged bank note paid and received in good faith, both parties supposing it to be good, is no payment. The mistake is mutual, and the party receiving the forged bill or note may return it, but he must do so promptly.

9. Fraud. ¹⁹No one is bound by a contract procured through fraud, because the assent is not freely given. It vitiates the contract, and leaves the defrauded party at liberty to rescind the agreement. The contract is not absolutely void, but only voidable. ²⁰That is, the party who has been defrauded may absolutely rescind the contract, or, if he chooses, he may treat it as valid, and hold the other party strictly to the performance of his part of the agreement. This is an advantage that the law gives to the innocent party. ²¹But if he elects to declare the contract void, he must do so promptly and completely, or he will be presumed to have assented to it. If, however, after knowledge of the fraud, he should exercise acts of ownership over the subject matter of the contract, he could not afterwards avoid it.

LESSON REVIEW.

1. What constitutes *mutual assent*?
2. Into what two elements is it resolvable?
3. Give an example of a *proposition*?
4. When may it be withdrawn?
5. What is the result of acceptance?
6. Give an example of qualified acceptance?
7. How may the *proposition* and *acceptance* be expressed?
8. If no time is mentioned when must an oral offer be accepted?
9. When in case a time is fixed?
10. When is a contract made by letter completed?
11. What effect has the loss after mailing of the letter containing an acceptance?
12. May *assent* be implied?
13. When will the law imply *assent*?
14. When will the law not imply assent?
15. What is *duress*, and how does it affect a contract?
16. Give examples?
17. What mistakes avoid a contract?
18. Give an example?
19. What effect has *fraud* upon a contract?
20. What right has the innocent party?
21. When must he elect to rescind the contract?

LESSON VI.

CONSIDERATION.

1. Its Nature and Necessity. ¹The *consideration* is the reason or inducement upon which the parties consent to be bound. In every contract there must be a legal and sufficient consideration. Without it there can be no valid

contract resting in mere words or expressed in writing, except in the case of sealed instruments, and under some circumstances, negotiable paper (p. 14, sec. 4). Hence, in general, a promise not supported by a consideration is void. ²A legal and sufficient consideration is,

1. Good.

2. Valuable. $\left\{ \begin{array}{l} 1. \text{ A benefit to the promisor.} \\ 2. \text{ A loss, or inconvenience, to the promisee.} \end{array} \right.$

2. ³**A Good Consideration** consists in natural love and affection between near relatives. It is a sufficient consideration, so far as the parties themselves are concerned, to support an executed contract, but not sufficient to render valid a mere promise or executory agreement; and it is not sufficient to uphold an executed contract where the rights of third parties are concerned. ⁴A father, in consideration of natural love and affection, deeds to his son a house and lot. As between them the consideration is sufficient; and although the father may afterwards regret his act and wish to recover the property, he cannot do so. ⁵But if the father had agreed, in consideration of natural love and affection, that he would, at some future time, deed to the son the house and lot, and had then refused to make the conveyance, the son could not compel the performance of the agreement. If, however, in the first case the father had been in failing circumstances, and unable to pay his debts when he deeded the property to his son, his creditors could interfere, have the conveyance set aside, and the property sold to pay their claims.

3. ⁶**A Valuable Consideration**, on the contrary, renders the contract valid against every person and under all circumstances. ⁷It is (1) *a benefit to the promisor, that is, something of value given or promised to be given to, or done or promised to be done for, the person who makes the promise.*

A gratuitous promise—a promise to make a gift—is not binding; hence if I make a promise to give you a horse, it is not binding, unless as an inducement to the making of such promise, some valuable thing, as money or other property, has been given or promised to be given to me, or something of value, as labor or professional services, has been done or promised to be done for me. ⁸The money may be paid or the labor performed by a third party, who is interested in having you own a horse. It is a *benefit* to me, and hence you can take advantage of such payment or labor and either you or the third party compel me by an action at law to fulfill my promise. But a valuable consideration is also ⁹(2) *a loss or inconvenience to the promisee, that is, any loss or inconvenience suffered by the person to whom the promise is made.*

¹⁰I promise to give you a carriage if you will go forty miles into the adjoining county and get it. You do so, and the carriage is yours. I have received no *benefit* from your journey, but it has caused you *loss or inconvenience*, and you can, therefore, defend your possession of it against me, and against all other persons. ¹¹It is to be observed that the relative value of the *benefit* or the amount of the *loss or inconvenience*, as compared with the thing promised, is not important. They need not be equivalents. It is presumed that each party to the contract has appealed to his judgment in the matter; and hence if the *benefit*

on the one hand or the *loss* or *inconvenience* on the other can be legally estimated at any value, however insignificant, the contract will be sustained.

4. Benefit and Loss. These illustrations follow the analysis strictly, but as a matter of fact, in actual business transactions there are but few contracts in which the consideration is confined to one of the foregoing analytical divisions, but rather includes them both. ¹²A manufacturer agrees to sell and a farmer to buy a reaping machine. The one intends to realize the price and the other to obtain the property. In reality, therefore, the price is the consideration that moves the seller to make his promise to sell, and the machine is the consideration that induces the buyer to promise to pay the purchase price.

5. Mutual Promises. ¹³It has already appeared that something of value *promised* to be given or done to or for the person promising is a *valuable consideration* to support his promise. It appears, therefore, that one promise is a valid consideration for another promise, and such is the case, if they are made at the *same time*. ¹⁴They must be *simultaneous*, and so important is this element of time that it will not be sufficient if such promises be made at different times in the same day. Mutual promises of marriage support each other. In like manner, a *promise* to render services is a valid consideration to uphold a note given for them.

6. A Conditional Promise is a sufficient consideration for a direct promise. Thus, where one sells and delivers a yoke of oxen for a price paid, and gives the purchaser liberty to return them within a limited time, the seller is bound absolutely, while the purchaser is at liberty to rescind the contract.

¹⁵A conditional promise is not binding until the condition is complied with. A promise in the nature of a proposition may become binding after it is acted upon, where there was originally no reciprocal promise. For example, one person promises another to pay him for goods to be furnished to a third, such promise becomes binding as soon as the goods are thus furnished.

7. ¹⁶Assignment of a Chose in Action. It is a general rule of law that choses in action may be sold and transferred like chattels. Such a transfer, therefore, is a sufficient consideration to uphold a contract, as where one who holds an agreement for the purchase of real estate assigns it to another in consideration of his engagement to perform professional or other services.

Causes of action, however, that are of a personal nature, as actions for breach of promise of marriage, for libel or slander, or assault and battery, are not assignable. They die with the person, and hence cannot form the consideration of a contract.

8. Accord and Satisfaction. ¹⁷Where there is a genuine controversy as to the amount of a debt, the payment of a less sum is a consideration for a release of the balance. This constitutes *accord and satisfaction*. ¹⁸Additional security for a part of the debt, given by the debtor out of his own means, will not support a release of the balance; but such additional security furnished by a third party will support the release. This rule has been qualified where a note

has been paid in part and surrendered, that being held to constitute a discharge of the debt.

9. Invalid Consideration. Every obligation is not sufficient as a consideration to uphold a contract. ¹⁹As has already been shown, a contract is void for want of consideration, which is based upon a *gratuitous* promise, as a promise to make a gift or to render *gratuitous* services, such as voluntarily assisting to save property from fire. Nor is a mere sense of justice sufficient where the person promising is under no legal obligation to perform his promise, as where a father gives his note to one of his children for the purpose of equalizing their interests. Any act or thing that is *illegal* by reason of being opposed to the principles of the common law or forbidden by express statute fulfills none of the requirements of a valid consideration—it is no consideration; and therefore a contract to commit a crime, as burglary or murder, or to defraud a person not a party to the agreement, is void. In like manner, any agreement or undertaking to do or perform something that is in its nature *impossible*, as a consideration, renders the contract void; as if one should promise to shoulder the obelisk and carry it across the Brooklyn bridge as a consideration for a contract to convey to him a house and lot.

10. Moral Obligations. An honorable man will fulfill his promises, though the law may not require him to do so. Positive law, as we have seen, ranges on a much lower plain. ²⁰A purely moral obligation is not a sufficient consideration to support a contract. A son who is in good circumstances is under a very strong moral obligation to support an indigent parent, but at common law his naked promise does not bind him to perform this duty. In some of the States, however, it is made by statute a positive obligation, that may be enforced according to the terms of such statute.

²¹There are certain moral obligations which are sufficient to sustain contracts made in consideration of them. These are *moral obligations* based upon a *pre-vibus legal liability*. A debt barred by the statute of limitations, that is *out-lawed*, is a sufficient consideration to support a new promise to pay it. So also is a debt against a bankrupt who has been legally discharged, or one incurred by an infant who, after coming of age, promises to pay it. In each case the new promise revives the debt.

11. Executed Consideration. ²²Where the benefit has been enjoyed or the loss or inconvenience suffered, and in consideration of it a promise to do or pay something is afterwards made, such benefit, loss or inconvenience is termed an *executed consideration*, that is, a consideration that has been *executed* or *finished* before the promise is made. Such a consideration is not sufficient to support the promise. A physician treats a patient who is very poor. Afterwards some benevolent person learns the fact and voluntarily promises to pay the physician for his services, but the promise is not binding.

²³Where, however, the consideration resulted from a prior request of the party promising it is sufficient to support the subsequent promise, and this previous request will be presumed in all cases where the person promising has derived a

personal benefit from such past consideration. "I am owing money at the bank; without my knowledge or request you pay and discharge the indebtedness; I subsequently promise to repay you; the law will presume on my part a previous request to pay the debt, and my promise to repay you is binding.

12. Failure of Consideration. ²⁵Where the consideration totally fails it avoids a contract. A note is void for failure of consideration where it is given for the right to make and sell a patented machine and it turns out that the patent is void.

Of a similar nature is the case in which one of the parties to a contract deprives the other of his consideration for the agreement. A landlord cannot enforce the terms of a lease against a tenant where he has, after renting the premises, used and occupied adjoining rooms in such manner as to deprive his tenant of the reasonable use and enjoyment of the leased premises. ²⁶A partial failure of consideration may be proved in reduction of damages.

13. Inadequacy of Consideration. The actual value of the consideration is not of much consequence. (P. 24, sec. 3.) The benefit on the one hand, or the loss or inconvenience on the other, may be very slight, and yet be legally sufficient. ²⁷The theory upon which this proposition of law is based is that each party is to determine for himself as to the adequacy of the consideration in the particular case, and when he is satisfied others must be. Hence, mere inadequacy of consideration, where it is not tainted with fraud and there is no warranty, will not avoid a contract.

LESSON REVIEW.

1. What is *consideration*? 2. Give the divisions of *consideration*? 3. What is a *good consideration*? 4. When is it sufficient? 5. When not sufficient? 6. What is the effect of a *valuable consideration*? 7. Give the first definition of *valuable consideration*. 8. From whom may the consideration move? 9. Give the second definition of *valuable consideration*. 10. Give an illustration. 11. Must the value of the consideration equal that of the thing promised? 12. Give an example showing how both divisions of consideration are combined in the usual business transaction. 13. Is a promise a valuable consideration for another promise? 14. When? 15. When is a conditional promise binding? 16. Is the assignment of a chose in action a valuable consideration? 17. What is *accord and satisfaction*? 18. When will and when will not additional security given for a part support a release of the whole debt? 19. Give illustrations of *insufficient consideration*. 20. Is a moral obligation alone a sufficient consideration? 21. When does a moral obligation become a sufficient consideration to uphold a contract? 22. What is an *executed consideration*? 23. When is it sufficient to support a subsequent promise? 24. Give an illustration. 25. What effect has a total failure of consideration? 26. What a partial failure? 27. Upon what theory is inadequacy of consideration not allowed to avoid a contract?

LESSON VII.

THE SUBJECT-MATTER.

1. What it is. 'In every valid contract there must be something definite, which forms the subject of the agreement. This is the thing *to be done or omitted*, and it constitutes the *subject-matter* of the contract.

2. Limitations. 'The general rule is that parties may contract concerning any matters or things, except such as are prohibited by law. This brings us to the general consideration of the subject of *the legality of contracts*; and as the field of permissible contracts is so much broader than that of the illegal ones, we shall make more satisfactory progress by examining the subject negatively, although it will be impossible within the scope of this work to do more than refer to the main classes of illegal contracts.

3. Effect of Illegality. 'An agreement to do an unlawful act is void. No cause of action can arise out of an unlawful or iniquitous contract. 'The court will never lend its aid to enforce a contract of such character; and whenever parties enter into a contract with the purpose of contravening a statute or the principles of the common law, no form of words that may be used will prevent the court from investigating the transaction and learning the truth concerning the intention of the parties.

4. Unlawful Subject-Matter. 'A contract will be *invalid* if the *subject* or subject-matter be *unlawful*. 'In order, therefore, that a contract shall be valid it must not be—

- | | | |
|---------------------------|---|---|
| 1. Against public policy. | { | 1. In restraint of marriage.
2. In restraint of trade.
3. Perversion of the acts of government.
4. Obstructive of the course of justice. |
| 2. Immoral. - - - - | { | 1. Immoral life.
2. Obscene publications.
3. Sunday desecration.
4. Bets or wagers. |
| 3. Fraudulent. - - - | { | 1. Fraudulent upon each other.
2. Fraudulent upon third parties. |

5. Against Public Policy. 'All contracts which, if enforced, would be opposed to the general welfare or good of the people are void, because, as is said, they *injuriouly affect public policy*. A large class of contracts is embraced under this head, which are on that ground rendered void. The principal subdivisions are separately considered in the following sections:

6. (1) 'In Restraint of Marriage. Contracts in restraint of marriage are generally void; but in a special case where it is not unreasonable, such restraint may be valid. A bequest by a husband to his wife on condition that she remain his widow, is held not unreasonable, she having been once married, and there-

fore not void as in restraint of marriage. ⁹A provision in a will giving property to a child on condition she does not marry until fifty years of age is void; but where the legacy was conditioned upon the legatee remaining single until twenty-one years of age, it was held that such delay was not in restraint of marriage, but operated only as a protection against a hasty and ill-advised marriage. ¹⁰A marriage brokerage contract, by which a person agrees to pay another if he will negotiate an advantageous marriage for him, is void, and money paid upon such contract may be recovered.

7. (2) "In Restraint of Trade. All kinds of lawful trade conduce to the public welfare; and hence any contract which operates to restrain such trade, except in a very restricted sense, is void. ¹¹A contract upon a sufficient consideration in *partial restraint* of trade may be valid, ¹²as where one agrees not to carry on a particular trade or business within certain limits, or outside of certain territory, or with certain persons. But an agreement, no matter what the consideration, not to carry on *any business*, or any particular business *anywhere*, is illegal and void.

¹⁴As to what extent *partial restraint* may go without rendering the contract void is a question to be determined by the court in each particular instance, in view of all the circumstances. But it must be, in all cases, such that the court can pronounce it *reasonable*; and since the legal presumption is that any restraint is void, the facts showing such *reasonableness* must be shown affirmatively to the court, for it will not be presumed.

¹⁵Contracts in partial restraint of trade that are valid arise oftenest when one person sells out his business to another, and agrees not to renew the same business in the same place. ¹⁶Combinations among merchants to raise the price of goods and among laborers to raise the price of labor, and all strikes organized to coerce the actions of others, are illegal.

8. (3) "Perversion of the Acts of Government. Good government is manifestly a public benefit. ¹⁸The proper exercise of the powers of government are for the public good, and hence any agreement intended to prevent the free use and application of such powers must be opposed to the welfare of the public; and therefore it is that all contracts having for their object the perversion of the acts of government are void, as *against public policy*. ¹⁹Such are all contracts for services as a lobbyist in favor of a bill before the Legislature, or for services in procuring signatures to a petition for a pardon. ²⁰But the rule does not cover the services of an attorney or counsel, who may lawfully appear in behalf of a private claim before a committee, or before the Legislature, and enforce payment under a contract for such services.

9. (4) Obstructive of the Course of Justice. ²¹All contracts the purpose or effect of which is to obstruct the course of justice are void, on the same ground of *public policy*. ²²The agreement of a creditor to withdraw all opposition to the discharge of his debtor, as a bankrupt under the old bankruptcy law, was void, and so is such an agreement in the case of an insolvent under State statutes, because such contracts tend to defeat the purpose and fair execution of the laws.

²³ Contracts made by a public officer in violation of his duty are void, and in like manner an agreement made with such officer, whereby he is to receive extra pay for unusual exertion in the line of his duty, cannot be enforced, as where a sheriff agrees for extra compensation for special exertion in the service of process. For the same reason, an agreement to hinder or stop a criminal prosecution is void, as is also one for the suppression or fabrication of evidence.

IMMORAL.

10. (1) Immoral Life. ²⁴ One may not agree for the performance of an immoral act or the leading of an immoral life; and if such an agreement be made, it is not binding. But where after an immoral course of life an obligation is given in satisfaction of the damages sustained by the weaker party, it will be upheld and enforced by the courts.

11. (2) ²⁵ Obscene Publications are injurious to society: they are corrupting and contrary to good morals; ²⁶ and hence a contract for the publication of obscene books or pictures is void.

In many of the States special laws have been enacted for the more effectual suppression of such publications.

12. (3) Sunday Desecration. ²⁷ The English statute prohibiting worldly labor or business on the Lord's day, has been adopted with slight modification in nearly if not quite all of the States. It forbids contracts for services of a worldly nature to be rendered on that day. ²⁸ In some of the States it is held to render void all agreements made on Sunday, while in others it is held to prohibit the open transaction of business, but does not annul private contracts entered into between individuals on that day.

13. (4) ²⁹ Bets or Wagers. Certain wagers are held illegal at common law because of their immoral tendency; such as wagers on the result of a prize fight, a cock fight, or a dog fight, and many others.

In some of the States all betting and gaming are prohibited by law; and all contracts for money or property taken on any chance, or uncertain event, are void; and the law allows the money to be recovered back, even from the stakeholder. So also are raffling and lotteries unlawful in some States, and of course all contracts founded upon them are illegal and void, no matter what the form of the lottery or raffle, or its purpose.

FRAUDULENT.

14. ³⁰ Fraud. It has been thought impossible to define *fraud* and include all its various forms; but for the purposes of this work it may be said to be any cunning, deception, or artifice used to circumvent, cheat, or deceive another.

³¹ It most frequently arises, in the ordinary course of business, either (1) from a statement of facts that is known to be false, or (2) from the concealment of facts that are known to exist, and that ought to be revealed. ³² The general rule

is that it renders absolutely void all contracts into which it enters; but there are certain exceptions to the rule, as we shall see, in favor of an innocent party.

15. (1) ³³Fraudulent Upon Each Other ³⁴Where both parties are guilty of fraud, neither can usually secure any relief from his position through the terms of the contract: neither will be allowed to enforce it against the other.

³⁵A contract in which one party is guilty of fraud, is said to be voidable at the election of the innocent party: ³⁶that is, he may insist, as in the case of an infant, upon the performance of the contract, and compel the defrauding party to carry out the terms of his agreement. ³⁷He may, however, elect to rescind the contract, and in that case he must do so within a reasonable time after discovering the fraud; and he must also return whatever he may have received under the contract.

³⁸When a buyer makes false representations in the purchase of goods, and by that means obtains credit, as where he says he is able to pay for them, when he is not, the contract is void, and the seller may elect to rescind it and retain the goods, or recover them if they have been delivered. ³⁹The purchaser cannot obtain a title through fraud, but having the goods in his possession, he may transfer a valid title to an innocent purchaser for value.

⁴⁰If the buyer be really insolvent, it is not fraudulent for him to refrain from disclosing that fact, where no inquiries are made, and he uses no means to deceive the seller; ⁴¹but if he conceal the fact of his insolvency, with the design of procuring goods and *not paying for them*, then such concealment is fraudulent.

⁴²It has not generally been held that the mere concealment or suppression of a material fact, was sufficient to set aside a sale on the ground of fraud, but very slight circumstances in addition to such concealment, such as a false statement, have been considered sufficient to constitute a fraud upon the other party.

⁴³Where, in a contract for the purchase of land, the buyer concealed the fact that he had discovered a valuable mine upon it, and represented that it was of no value, except for a sheep pasture; the false statement made the concealment a fraud for which the sale could be set aside.

⁴⁴The concealment of an *opinion* or a *conclusion* is not fraudulent. ⁴⁵The rule is confined to *facts*, and to facts that are particularly within the knowledge of the party, and could not have been discovered with proper diligence by the other.

⁴⁶If, however, there is some special trust, or confidence, existing between the parties, then the concealment of anything that ought to be known, even though readily discoverable, would be fraudulent. Whenever silence would be equivalent to a misrepresentation, or assent to a false statement, no person could be permitted to remain silent.

LESSON REVIEW.

1. What is the *subject-matter* of a contract? 2. What is the general rule as to liberty of contracting? 3. What is the effect of an agreement to do an unlawful act? 4. What position does the court take in regard to such agreements? 5. What is the effect of an unlawful subject-matter? 6. Give three general classes of contracts that are not valid? 7. What is meant when

a contract is said to be void as against public policy? 8. What is the first kind of contracts void as against public policy? 9. Give illustrations of contracts void because in restraint of marriage? 10. Is a marriage brokerage contract valid? 11. What is the second kind of contracts void as against public policy? 12. What modification is there of the general rule that all such contracts are invalid? 13. Give illustrations showing the extent of such partial restraint? 14. How is this extent to be determined, and what is its measure? 15. In what cases are such contracts most frequently made? 16. Name certain combinations that are illegal? 17. What is the third kind of contracts void as against public policy? 18. Why are they so declared void? 19. Give illustrations of such contracts? 20. What employment of an attorney is not thus prohibited? 21. What is the fourth kind of contracts void as against public policy? 22. Give an illustration? 23. Give illustrations applying the rule to public officers. 24. What is the first kind of contracts void for immorality? 25. What is the second? 26. Could a contract for the publication of obscene books or pictures be enforced? 27. What is the third kind, void for immorality? 28. How does the law differ in the different States? 29. What is the fourth kind of contracts void for immorality? Give illustrations? 30. How may *fraud* be defined? 31. How does it most ordinarily arise? 32. What is the general rule regarding its effect upon contracts? 33. What is the first kind of contracts void for fraud? 34. What is the effect where both parties are guilty of fraud? 35. Where one party is guilty what is the effect? 36. What right has the innocent party? 37. What other right, and under what conditions, may he exercise it? 38. What right has the seller when the buyer procures goods under false representations? 39. What is the effect where the buyer transfers the goods to an innocent purchaser for value? 40. Must an insolvent buyer necessarily disclose the fact of his insolvency? 41. When will the concealment of that fact be fraudulent? 42. Is a mere concealment of a fact generally considered fraudulent? 43. Give an illustration? 44. Is the concealment of an opinion fraudulent? What renders it so? 45. To what class of facts is the rule confined? 46. What exception exists to this rule?

LESSON VIII.

1. (2) Fraudulent Upon Third Parties. 'Whenever a contract is made the effect of which is to defraud a third person it is void. 'This occurs most frequently (1) in contracts perverse of the insolvent laws, (2) in the employment of *puffers* at auction sales, (3) in fraudulent assignments, and (4) in fraudulent sales.

³(1) Where an insolvent debtor is arranging for a compromise of his debts and a discharge under the insolvent laws, and in order to induce some particular

creditor to withdraw his opposition and consent to such discharge he agrees to give him a greater percentage or better security than the others, it is a fraud upon them and hence void.

(2) In sales at public auction it is not uncommon for the owner of the goods or property to be sold to secretly employ *by-bidders* or *puffers*, whose business it is to make fictitious bids, and by thus taking advantage of the eagerness and excitement of bidders to force prices up above the real value of the article sold, while at the same time there is an understanding with the auctioneer that the persons so employed shall not be held to their bids. ⁵This is a fraud on third parties, and a purchaser whose bid has been directly forced by such *by-bidder* can refuse to carry out his contract. The rule is that the buyer may avoid his purchase in case the bid immediately preceding his was fictitious. ⁶It is, however, entirely legal for the owner to employ *puffers*, provided he publicly announces before the commencement of the sale that he has done so; or he may fix a price below which goods shall not be sold; or, by giving previous public notice, he reserves as a condition of the sale the right to make one bid for himself.

(3) ⁷If a debtor in failing circumstances assigns his property, or any part of it, without consideration, to some person for his own benefit, whether to be used for him or subsequently returned to him, it matters not what the form may be, it is a fraud upon his creditors, provided he has not retained sufficient property to pay his debts. ⁸In that case the creditors may have the assignment set aside in an action brought for that purpose. ⁹This is to be distinguished from the case where a failing debtor turns over his property to a creditor to pay his claim, for a debtor may legally use all his means in paying one or more creditors, to the exclusion of all others, provided the debts be honest ones. Under the laws of some States a debtor who makes an assignment for the benefit of his creditors may direct his assignee to pay certain creditors in full before anything is paid to others.

(4) ¹⁰Where one sells property to another, but retains possession of the thing sold, such possession is a badge of fraud. As in the case of a fraudulent assignment, the sale is good as between the parties, but void as to creditors of the seller, who may have the sale set aside, the property sold and the proceeds of such sale applied toward the payment of their claims.

CONTRACTS THAT MUST BE IN WRITING.

2. The Statute of Frauds. ¹¹In addition to the conditions necessary to the validity of all contracts, there is in a large class of them another requirement, viz: *that they must be in writing*. ¹²An old English law, passed in the reign of Charles II. was called THE STATUTE OF FRAUDS AND PERJURIES. ¹³It was so called because the main purpose of its enactment was, by requiring the largest portion of business contracts to be made in writing, to prevent fraud and perjury, to which there was so great temptation in trying to enforce agreements that rested in memory only. ¹⁴This law has been in substance reenacted

in nearly if not quite every State in the Union, and with us is referred to simply as *The Statute of Frauds*.

3. What the Statute Requires. ¹⁵In general, it requires that the following classes of contracts shall be made in writing and signed by the party or parties to be charged, viz:

1. *Leases of land for more than one year.*
2. *Every contract for the sale of lands or any interest in lands.*
3. *Every agreement that by its terms is not to be performed within one year from the making of it.*
4. *Every special promise to answer for the debt, default or miscarriage of another person.*
5. *Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.*
6. *Contracts for the sale of personal property involving more than fifty dollars, unless*

- (1) *Some part of the property shall be delivered, or*
- (2) *Some part of the purchase price be paid, or*
- (3) *The sale be by auction.*

4. Meaning of the Statute. ¹⁶The requirement that such contracts must be in writing does not necessarily mean that in every case a document shall be regularly drawn and executed, with all the legal formalities. The terms of the statute itself clearly indicate this when providing that the agreement or contract, "or some note or memorandum thereof," must be in writing and signed by the party to be charged therewith. ¹⁷Hence, the most incorrectly spelled and ungrammatical statement of the agreement, properly signed, is sufficient, provided it expresses intelligibly the understanding of the parties. ¹⁸It may be written in ink or with a pencil; it may be printed on a type writer or a printing press, and still fill the requirement of the statute that it shall be in writing. ¹⁹And the signature need not be the full name, though it ought to be for convenience in identifying the person, but initials may be used, or any device or mark that one may adopt as his signature.

²⁰This statute, as we have seen, does not dispense with any of the conditions already found necessary to the validity of a contract. It simply adds another; but a disregard of the new requirement does not give to contracts the characteristics of illegality; it only makes them void.

5. (1) and (2) Leases and Contracts for Sale of Land. These divisions of the foregoing synopsis of the Statute of Frauds are not properly included under the title of *commercial law*; but it seems desirable that all its provisions should appear together, to facilitate memorizing them. They will be again referred to in the concluding pages of this work, where the subject of *real property* will be briefly considered.

6. (3) ²¹Agreements not to be Performed within One Year. This applies, as will be observed, only to an agreement that, *by its terms*, is not to be performed within one year from the making of it; that is, when it is specific

stated that such is the case, or when it appears from the necessary construction of the contract.

²²But if the contract may be performed within one year the statute does not apply, although such performance is capable of an indefinite continuance.

7. (4) Promises to Answer for the Debt of Another. ²³Cases arising under this division come under the title of GUARANTY AND SURETYSHIP. One who guarantees the payment of another's debt, or undertakes that he shall pay for property purchased by him, or that he shall perform certain services in a specified manner, comes under the statute in making a "promise to answer for the debt, default or miscarriage" of another person. Such a promise must be in writing. ²⁴There is often considerable difficulty in applying the provisions of the statute. It arises in trying to determine whether the promise has been made *for another*, or to answer for the *debt, default or miscarriage* of another, or, as it is sometimes stated, whether the promise is *original* or *collateral*. ²⁵If I should go with you to a grocer's and tell him to let you have forty dollars worth of groceries and charge them to me, or that I would pay for them, it would not be a promise to answer for your debt, because you have none. It is my debt alone, although for your benefit; my promise is *original*, and, although oral, is valid. ²⁶If, on the other hand, I should tell the grocer you would pay for the goods, or that I would see that you paid for them, or that I would pay for them in case you did not, it would be a *collateral* promise—a promise to answer for your debt; that is, to pay it in case you did not, and hence void unless in writing. The frequency with which some or all of these expressions or promises are heard in the course of daily business transactions is somewhat wonderful, when it is considered that they are without any binding force. It is probable, however, that in many instances the persons concerned believe they are valid, but in the large majority of cases they are intended to amount to a simple recommend.

8. (5) Promises in Consideration of Marriage. ²⁷The exception noted in this division clearly indicates that it does not apply to the usual "engagement" or promise of marriage made at the same time between two persons, that is, mutual promises of marriage. ²⁸It has reference to the agreements in regard to disposition of property that are sometimes made in contemplation of marriage, as where one party agrees to give to the other a certain sum of money or other property in consideration of their marriage, or where some third person who is interested offers to give property to the parties about to be married, in consideration of such marriage. All such promises are void unless made in writing and properly signed.

9. (6) Contracts for Sale of Personal Property. ²⁹This provision of the statute of frauds, as reenacted by the different States, has been in some cases modified by reducing the amount for which an oral contract of sale is valid as low as thirty dollars, and in others by raising it as high as two hundred dollars. The application of this provision naturally comes under the title SALES OF PERSONAL PROPERTY, and it will be there resumed.

LESSON REVIEW.

1. What is the effect where a contract is fraudulent as to third parties?
2. In what cases does this most frequently occur? 3. Explain how it occurs under the insolvent laws.
4. What are *puffers* or *by-bidders*, and what is the purpose of their employment? 5. What is its effect generally? 6. How may they be legitimately employed.
7. Explain what is meant by a fraudulent assignment.
8. What right does it give a creditor? 9. May a debtor pay one creditor to the exclusion of all others? 10. What is the effect of a sale of property where the seller retains possession of the thing sold? What rights have creditors in that case?
11. What additional requirement is there in the case of a large class of contracts? 12. What was the English statute called? 13. Why was it so called? 14. How are the similar statutes referred to in this country? 15. What contracts does it require to be in writing? 16. Does the statute require that a contract shall be formally written? 17. What satisfies the requirements of the statute? 18. How may the *writing* be done? 19. How may it be signed? 20. What is the effect of this statute so far as the necessary conditions are concerned? 21. How is the provision in regard to contracts to be performed within one year limited? 22. Does it apply to a contract that may be performed within one year, though capable of longer continuance? 23. What is meant by "a promise to answer for the debt, default or miscarriage" of another person? 24. What difficulty arises in applying this provision? 25. Give an illustration of an *original promise*. 26. Of a *collateral promise*. 27. What important exception is there to the general requirement in regard to promises in consideration of marriage? 28. To what has this requirement reference? 29. How has the provision relating to sales of personal property been modified?

LESSON IX.

INTERPRETATION OF CONTRACTS.

1. 'The Presumption is that where parties have entered into a contract its terms express their agreement; that they mean exactly what they say, and hence that their rights are to be determined by the plain language of the instrument. ²Owing, however, to the fact that it is extremely difficult at best to make language express just what one means and nothing else, and to the further fact that in very many cases it is used without regard to or knowledge of its exact meaning, it becomes necessary that certain *rules of interpretation* should be laid down as guides in the construction of contracts. A large number of these rules have been established, but only the principal ones can be considered here. These will be treated under the following heads, viz:

1. The intention of the parties.

2. Variation between writing and printing.
3. Doubtful terms.
4. Technical words.
5. Usage and custom.
6. Writings that are to be construed together.
7. Dependent and independent covenants.
8. Conditions precedent.
9. Entire and divisible contracts.
10. Liberal construction.
11. Construction as to time.
12. Law of place.

2. (1) The Intention of the Parties. ³The grand rule of interpretation, and one that in a measure anticipates all the others, is to ascertain the intention of the parties. ⁴To this end, the law does not allow either the grammatical or literal sense to overcome such intention.

3. (2) Variations Between Writing and Printing. ⁵Where one part of a contract is written and another part printed, and the two are inconsistent with each other, the writing will prevail.

4. (3) Doubtful Terms. ⁶A promise made in such form that it admits of being understood in more than one sense is to be construed according to the sense in which the person making the promise believed at the time the promise was made the other party received it. He is bound by the sense in which he knew the person to whom the promise was made received it. ⁷Where the intention of the parties as expressed in a *covenant*, that is, any promise contained in a sealed instrument, is doubtful, that construction is to be adopted which is most to the advantage of the *covenantee*, that is, the person to whom the promise or covenant is made. ⁸In general, where there is doubt as to the intention of the parties as expressed in a contract, it will be presumed that the words were used according to their usual meaning. ⁹The whole instrument will be construed together in order to arrive at the purpose of the parties in making it; and if, in order to give effect to such purpose, something is still needed, the law will supply it.

5. (4) Technical Words. ¹⁰There is in every contract an implied reference to the situation of the parties and to the nature of the business involved. Therefore, when they make use of *technical* words or *abbreviations* they are to be understood in the sense in which they are employed in the particular trade or business to which they belong, and such sense may be proved by oral evidence.

6. (5) Usage and Custom. ¹¹The parties to a contract are supposed to be familiar with the custom or usage in the business to which it relates and to contract with reference to it; hence the contract will be interpreted in the light of such custom or usage.

7. (6) Writings that are to be Construed Together. ¹²Where two or more writings are executed at the same time, between the same parties, and

relate to the same transaction, they are to be read together as one contract. ¹³A deed and a mortgage given back at the same time to secure a part or all of the purchase price are to be read together, as though they formed one instrument. When a description or statement is contained in one contract, referring to a similar description or statement in another contract, the second is thus made a part of the first. For example, where the description in a deed contains a reference to the description of the same property in another deed, or to a map on file in some public office, such reference makes the former deed or the map a part of the new deed.

8. (8) Dependent and Independent Covenants. ¹⁴Where in a contract for the sale of lands the *vendor*, that is the seller, agrees to execute and deliver a deed, and the *vendee*, that is the purchaser, agrees to pay and secure the purchase price on a day named, these promises are called *dependent covenants*. ¹⁵They depend upon each other because they are to be performed at the same time, and one is the consideration for the other. ¹⁶Where, however, in a similar contract the vendee promises to pay the purchase price in so many annual installments, and the vendor promises to execute and deliver a deed at the time the last payment is made, the promise of the vendee in regard to each payment except the last is *independent*, that is, it does not depend upon anything else, and he may be sued for each as soon as it becomes due; ¹⁷but the promise to make the last payment is *dependent*, precisely as though the entire purchase price was to be paid at that time, that is, the vendee will not make the payment unless the deed is delivered to him, and the vendor will not deliver the deed unless he receives the money. Where one sells wheat to be delivered on demand, and the buyer agrees to pay for the same at a certain future date, the two promises are *independent*. In general, where by the terms of the agreement both parties promise to perform at the same time, and the undertaking of the one party is a consideration for that of the other, such promises constitute *dependent covenants*. ¹⁸In such cases one party cannot recover of the other or compel performance of his agreement until he has himself performed or offered to perform.

9. (8) Conditions Precedent. ¹⁹Where some act must be performed by one person before another is liable, or in order to make him liable, such act is termed a *condition precedent*, that is, it is a condition the performance of which must go before such liability. ²⁰When persons subscribe to a fund upon condition that the subscription shall not be binding unless an amount sufficient for the purpose in view shall be secured, they will not be bound until the condition has been fulfilled. The securing of such amount is a *condition precedent* to their liability. Where an agreement for the purchase of personal property provides that payment shall be made when it is all delivered, the seller can recover nothing until he has performed the condition. So where a building contract provides that the work shall be done according to certain plans and specifications, and that final payment is to be made when the work is finished and certified to by the architect, the completion of the work and certificate of the architect are conditions precedent to final payment. The contractor must comply strictly with the terms of the contract, and he cannot avoid the operation of

such condition precedent by showing that he had been prevented from completing the work by fire or other inevitable accident. ²¹ But where the employer, or his servants or agents, have prevented such performance, it will be held that the condition precedent has been waived; ²² and because such condition sometimes operates harshly a waiver of the strict terms of the contract is more readily inferred.

10. (9) Entire and Divisible Contracts. ²³ An entire contract is one in which an entire performance by one party must precede performance by the other, as where an agreement is made to perform a certain piece of work, to be paid for when completed. Here the person agreeing to do the work must do it all before he can claim payment. His agreement is *indivisible*. ²⁴ On the other hand, a contract is *divisible* when one party agrees to perform successive acts, for each of which a separate compensation is named, and there is nothing in the agreement making a complete performance a condition of payment, as where one contracts to sell twenty-five tons of hay at a certain price per ton, to be delivered one ton per week and paid for as delivered.

11. (10) Liberal Construction. ²⁵ Where a contract is so made that it may mean something or nothing, that is, it may be interpreted either so as to take effect as a valid agreement or be entirely void for uncertainty, it will be presumed that the parties intended to make it effective, and the former construction will be placed upon it, although it may even be necessary to adopt the less obvious meaning of the language. It is a rule that commercial contracts are to be construed liberally, so as to give effect to the common sense of the agreement. ²⁶ To this end the law will often supply omissions; and where there are repugnant clauses one or the other will be rejected for the same purpose. Where the meaning of particular words has been definitely fixed by statute, as is frequently the case, they will be held to have been used in that sense in all cases arising under such statute.

12. (11) Construction as to Time. ²⁷ When there is an agreement as to the time of performance of a contract, the rule is that it must be performed within or at that time. ²⁸ When a person agrees to do some act so many days after date, the rule is to exclude the first and include the last day. A person agrees on the first day of May to pay a certain sum of money thirty days after date; he must make the payment on the thirty-first day of that month. ²⁹ Where, however, an act is to be performed between two specified days, they must both be excluded in determining the time of performance. ³⁰ The intent of the parties or usage will sometimes determine it otherwise. ³¹ Where a lease is given for a year or term of years from the first day of May, if the rent is made payable quarterly on the first days of August, November, February and May, it will be presumed to indicate the intention of the parties that the term should include the first of May. Where it is a custom of the place that the year shall begin at noon of that day, a lease so drawn will be held to commence at that time. ³² Where no time is named for the performance of a contract it must be immediate, unless from the nature of the case that is impossible, or clearly not

contemplated by the parties, when it will be presumed that they intended a *reasonable time*. ³³ What is a *reasonable time* in any given instance will depend upon the nature of the undertaking, and where there is an action at law the jury must decide that question upon all the facts in the case.

³⁴ The meaning of the word *month* is fixed by statute in some of the States, and is generally in this country construed to mean, when used in contracts, a *calendar month*. ³⁵ *Day* usually means an entire day. ³⁶ It is always so construed unless injustice would result from that construction, and in that case the law will take account of the fractions of a day. ³⁷ Where the time specified for the performance is such that the date for the doing of the particular act falls upon Sunday, it will be excluded, and the party will have the following day for performance, except in the case of negotiable paper when the last day of grace falls upon Sunday, and then in most of the States payment must be made on Saturday. ³⁸ But Sunday is only thus excluded when it happens to be the last day for performance. Intervening Sundays are counted. ³⁹ Where performance of a contract made on Thursday is to be ten days after date, the last or tenth day will then be a week from the following Sunday; hence the party will have all of the Monday following in which to perform. Here two Sundays intervene, but only the last is excluded. If, however, the date were Friday, then performance would have fallen on the same day, that is a week from the following Monday. In this case two Sundays intervene and neither is excluded; so in the first instance the party really has eleven days and in the second ten in which to perform.

13. (12) Law of Place. ⁴⁰ The general rule is that the law of the place where the contract is made, except where real estate is concerned, governs its construction and determines its validity, unless by its terms a contrary intent is manifested. "But this is based upon the presumption that it is to be performed at the same place; hence where the contract itself either expressly or tacitly contemplates performance in some other State or country, the presumed intention of the parties is that its construction and validity shall depend upon the law of the place of performance. ⁴¹ Generally, however, where a contract is void, either by the law of the place where it is made or where it is to be performed, it is illegal and void everywhere; and yet it has been held that in the case of a contract made in one State for the payment of money in another, the parties may legally provide for the payment of interest according to the law of either State. If, however, the transaction is merely a cloak to cover the taking of unlawful interest it will not be sustained.

LESSON REVIEW.

1. What presumption arises in regard to the language of a contract?
2. Why is this presumption not conclusive?
3. What is the first and most important rule of interpretation?
4. How far does the law go in ascertaining the intention of the parties?
5. What is the rule in regard to variations between writing and printing?
6. What is the rule in the case of a promise that admits of being understood in more than one sense?
7. What is a *covenant* and

how construed in case of doubtful meaning? 8. What is the presumption in regard to the meaning of the words used? 9. What is the rule in regard to considering the contract as a whole? What in case of omissions? 10. What reference is implied in every contract, and how does it effect the use of technical words and abbreviations? 11. What is the rule in regard to custom and usage and upon what is it based? 12. What writings are to be construed together? 13. Give illustrations. 14. Give an illustration of *dependent covenant*. 15. Why called *dependent*? 16. Illustrate *independent covenants* and explain what they are? 17. What promise in the example given is dependent, and why? 18. What is necessary in case of dependent covenants before a recovery can be had? 19. What is a *condition precedent*? 20. Give illustrations. 21. What will waive the performance of a condition precedent? 22. Is such waiver readily inferred or not, and if so, why? 23. What is an entire contract? 24. What is a divisible contract? Give an illustration. 25. What is the rule in regard to the liberal construction of contracts? 26. To what extent is this carried in regard to omissions and repugnant clauses? 27. What is the general rule of construction as to time? 28. When is the first day excluded and the last included? Give an illustration. 29. What is the rule where an act is to be performed between two dates? 30. What will vary this rule? 31. Give an illustration. 32. Where no time is mentioned what is the rule? 33. Upon what does the question of *reasonableness* of time depend and how is it determined in an action? 34. In what sense is the word *month* generally used in this country? 35. How is the word *day* used? 36. When used otherwise and for what purpose? 37. When is Sunday excluded? 38. When included? 39. Give an illustration of each. 40. What law generally determines the construction and validity of a contract? 41. Upon what presumption is this based? 42. What is the general rule in case a contract is void either by the law of the place where it is made or where it is to be performed?

LESSON X.

REMEDIES.

1. Definition and Object. When two or more persons have entered into a contract, certain *rights* are thereby created: that is, each one has a right to have each of the others perform his part of the agreement. 'A manufacturer engages with a merchant to make five thousand yards of a certain kind of cloth, and deliver it to him at an agreed price, which the merchant promises to pay. This contract, the moment it is entered into, establishes the right of the merchant to have the cloth made and delivered to him according to the terms of the agreement, and the right of the manufacturer to be paid the price upon its de-

livery. But suppose the manufacturer fails or refuses to deliver the goods as agreed, or that after he has delivered them the merchant refuses to pay the price, either would be an infraction of the others rights, and would constitute what is called a *breach*. ²Hence in general *breach of contract* means the violation of any right under an agreement, either by failing to do what is required, or doing what is forbidden. Such *rights* would be of very little value unless there were some power of protecting and enforcing them. This power the law possesses through certain means called *remedies*. ³Hence a *remedy* is defined as the legal means employed to enforce a right or redress an injury.

2. Civil and Criminal. Remedies are divided into *civil* and *criminal*. ⁴The latter does not fall within the province of this work; and it will be sufficient to say that it belongs to the people in their governmental capacity, and is used for the protection of society and the punishment of crime, as where a robber is arrested, tried, convicted and imprisoned, by the people acting through their public agents or officers. ⁵On the other hand the civil remedy belongs to the individual, and is his means for enforcing his personal rights, and redressing his private wrongs.

3. Judgment. ⁶When a contract is broken, the remedy of the party injured is by action or suit for damages, that is, he may sue the other party to recover compensation for the injury he has suffered. ⁷If his claim is sustained, a *judgment*, which is the award of the court, is entered against the party at fault for a certain sum, called *damages*. The amount that ought to be allowed for damages in any particular case depends upon circumstances. Some times the amount is agreed upon in advance by the parties and inserted in the contract itself; but generally the amount has to be estimated in view of all the facts in the case; and certain rules have been established to aid the court and jury in arriving at a conclusion. These will be considered in subsequent pages.

4. Execution. ⁸If the judgment is not *satisfied*, that is paid, by the party against whom it is obtained, called the *judgment debtor*, an *execution* is issued to the proper officer. ⁹This is a written direction of the court addressed to the officer by his official title as *sheriff* or *constable*, requiring him to seize and sell enough of the debtors property to pay the judgment. ¹⁰Formerly where no property could be found by the officer he might imprison the judgment debtor, and under some circumstances that power yet remains. This was known as the right of imprisonment for debt, and became very odious. It has now been largely abolished by statute in the different states and greatly restricted where it is allowed at all.

¹¹In some states the law provides for pursuing this remedy further, by *proceedings supplementary to execution*. By this means the creditor is enabled to bring the judgment debtor before the court or a referee, and examine him under oath, to discover any property he may have secreted or put out of his hands to evade the execution.

5. Injunction. ¹²In the great number of cases arising out of breach of contract, the remedy by action for *damages* is the only one applicable, but there is

occasionally an instance where a person attempts to do what he has lawfully agreed not to do, or has no right to do, in which case either with or without awarding damages the court grants an *injunction*. ¹¹This is an order or direction of the court compelling such person to refrain from doing that particular act or thing.

DEFENSES.

6. Definition. ¹⁵It is seldom that all the truth and all the justice in a case are on one side. Hence it happens not infrequently that where a party to a contract seeks to enforce its terms by applying one of the remedies already considered, the other party, although perhaps admitting the contract, has some good grounds, by reason of the existence of some particular state of facts, why he should not be compelled to pay damages or otherwise conform to the demands of the party suing. This state of facts constitutes his *defense*. The principal defenses that may be interposed will be considered under the following divisions: (1) *Performance*, (2) *Payment*, (3) *Accord and Satisfaction*, (4) *Arbitration and Award*, (5) *Pendency of Another Action, or Judgment Recovered*, (6) *Tender*, (7) *Statute of Limitations*, (8) *Set-off*, (9) *Recoupment*.

7. (1) Performance. ¹⁶When one person sues another to recover damages for the breach of a contract, he must allege in his complaint and prove at the trial, performance or readiness to perform on his part, whenever such performance is a condition precedent to his right of recovery, or where the consideration is concurrent. ¹⁷The consideration is said to be *concurrent* when the acts to be done by the parties *run together*, or are to be performed at the same time. ¹⁸A farmer who has sold and agreed to deliver his wool at a certain time and place, and sues for the purchase price, must show that he has delivered the wool according to the terms of the contract of sale, or that he offered to do so, and the purchaser refused to accept it. ¹⁹But the defendant may perhaps claim to have performed his part of the contract, and in that case he sets up in his answer his defense of *performance*. ²⁰In order to constitute a good defense, the performance must conform to the terms of the contract and the requirements of the law.

8. Manner of Performance. ²¹This depends upon and must conform to the conditions of the contract, according to the legal construction. ²²If it requires one to pay money he must seek out the creditor, or his duly authorized agent, and pay or tender the amount to him. Where an artist is employed to paint a portrait, his employer is entitled to the benefit of his personal skill and is not required to accept a painting produced by another. Where the contract was to deliver a certain number of shares of full-paid stock of a corporation, it was not performed by delivering spurious stock illegally issued. ²³If a contract is so made that one of two things may be done, the rule is that the party who by the terms of the contract must do the first act has his choice; but if the act must be done by a certain time, and he allows the time to pass without exercising his right of choice, he cannot afterwards do so. ²⁴The rule formerly was that a party is to be held strictly to the terms of his contract, but that has been of late somewhat relaxed, as where a builder has in good faith intended to comply with

the requirements of the contract and has substantially done so, he may notwithstanding trivial defects and omissions recover the contract price, less the damage resulting from such defects or omissions.

9. Time of Performance. ²⁶ Whenever the agreement fixes a time and place for performance, such requirement must be complied with, unless, as is the case with other requirements, it should be waived by the other party.

10. Non-Performance. There are, however, circumstances that will excuse performance and amount to a defense. ²⁷ The general rule is, that where by a lawful agreement a party engages positively to do some act, he must either do it or be liable for damages for nonperformance, no matter how burdensome or even impossible it may have become by reason of the changed circumstances. ²⁷ Where one rents a building and positively covenants to keep it in repair, he will be obliged to carry out his agreement although it might necessitate his rebuilding the entire structure in case of its destruction by fire. ²⁸ But where from the nature of the agreement it appears that the parties must have contemplated the continued existence or unchanged condition of some person or thing in order to give effect to the contract, and where no other purpose or intention appears by reason of a warranty express or implied, then the contract is not to be construed as *positive*, but as subject to the implied understanding that the parties shall be excused from performance in case it is rendered impossible by *the act of God*. ²⁹ This expression, *the act of God*, as used in the law, means any accident produced by a physical cause which is irresistible, such as lightning, tempest, perils of the sea, inundation and earthquake, and also the sudden illness or death of a person. ³⁰ In some cases performance will be excused when it is prevented by *public enemies*. ³¹ These are the citizens of a hostile country, and not robbers or thieves, whose depredations are confined to individuals or communities. ³² Where the contract provides for the rendering of personal services requiring special skill or qualifications, so that the person making the agreement is the only one competent to perform them, his permanent illness will excuse performance.

11. Part Performance. ³³ No partial performance of an entire contract can entitle the person performing to any proportional part of the compensation provided for by the agreement, because such contract is incapable of division; ³⁴ but where a servant has rendered valuable services to his employer, before his illness, he may recover for them upon a *quantum meruit*. ³⁵ The meaning of this expression is *as much as he deserves*, hence the servant in that case would recover what his services are really worth, and not necessarily a proportional amount of the compensation provided for in the contract, although this may be taken into account in determining their value.

12. Rescission of Contract. Immediately in the line of the last sections comes a question as to the effect of nonperformance by one party in justifying the other in rescinding the contract. ³⁶ It is settled that where the party who is bound to perform a *condition precedent* fails to do so, such nonperformance permits the other party to rescind the contract, and excuses him from performance.

on his part. ³⁷ But in general, in order to thus relieve one of the parties, the nonperformance of the other must be so absolute as to entirely defeat the aim and purpose of the contract; and where one has this right to rescind, it is indivisible and can only be exercised by rescission of the whole agreement. ³⁸ He cannot elect to consider it in force as to some of its provisions and void as to others. ³⁹ And as in the case of rescinding a contract for fraud, the party can only rescind where he is without fault; ⁴⁰ and he must exercise the right within a reasonable time.

LESSON REVIEW.

1. Show by illustration what is meant by a *right*.
2. Define *breach of contract*.
3. What is a *remedy*?
4. How are remedies divided?
5. How are criminal remedies used? Give an illustration.
6. How are civil remedies used?
7. What is the remedy for a breach of contract?
8. What is a *judgment*?
9. When is a judgment not satisfied?
10. What is an execution?
11. What further remedy did the judgment creditor formerly have against the judgment debtor?
12. What other proceedings may the creditor take, and for what purpose are they resorted to?
13. When does the court grant an injunction?
14. What is an injunction?
15. Explain what is meant by *defense*.
16. When must one allege and prove performance or an offer to perform?
17. When is consideration said to be *concurrent*?
18. Give an illustration.
19. What may the defendant do in case he has performed his part of the contract?
20. What performance will constitute a good defense?
21. Upon what does the manner of performance depend?
22. Give illustrations.
23. Where one of two things may be done under a contract which party has the right of choice, and within what time must he exercise it?
24. Has there been any modification of the rule that performance must strictly follow the terms of the contract? Illustrate.
25. What is the rule as to time of performance?
26. What is the general rule in regard to performance in case of positive engagement?
27. Give an illustration.
28. When will nonperformance be justified?
29. What is meant by the *act of God*?
30. What else will sometimes excuse performance?
31. Who are public enemies?
32. When will illness excuse performance?
33. In what cases can there generally be no recovery for part performance?
34. When may a servant recover for part performance?
35. What is the meaning of *quantum meruit* and what is its application?
36. When may a party to a contract rescind it?
37. What must be the nature of the nonperformance to justify such rescission?
38. May he rescind in part?
39. May a party who is at fault rescind?
40. When must the right to rescind be exercised?

LESSON XI.

• **1. (2) Payment.** ¹Unless the contract otherwise provides, every debt or demand created under it is payable in that form of money known as *legal tender*. ²It is so called because by law it may be *tendered* or offered in payment of debts. Hence one who has entered into an agreement to pay money must make his payment in *legal tender* if the creditor requires it. As a matter of fact, however, comparatively few of the debts created in commercial transactions are thus paid. ³Under the Constitution of the United States, Congress alone has power to coin money and regulate its value; and therefore the weight and composition of all our coins are regulated, and their legal tender quality determined by Act of Congress. ⁴During the war between the northern and southern States, Congress, under this constitutional authority, made United States treasury notes, popularly known as *greenbacks*, legal tender in the payment of all debts. ⁵The money in use in this country which has been made legal tender is as follows, viz.:

1. Gold coins.
2. Silver coins. (Those below one dollar in value are legal tender only, in sums of not more than ten dollars.)
3. Copper and nickel coins. (These are legal tender in sums of not more than twenty-five cents.)
4. United States Notes.

2. National Bank Bills. ⁶It will be observed that one of our principal kinds of money does not appear in this list, viz., the National Bank bills, or as they are usually called, *national currency*. Although in such common use this currency is not legal tender, and no creditor need accept it in payment of his claim, yet it is in reality taken with the same freedom and safety as the United States notes, because equally well secured. ⁷Where the debtor offers national currency in payment of his debt, and the creditor does not object to it on that account, he will be presumed to have waived that requirement, and cannot thereafter question the legality of the tender on that ground.

3. Counterfeit Money. ⁸Where payment is made in counterfeit money it does not discharge the debt, although received by the creditor as payment, and paid in good faith by the debtor. ⁹The creditor must, however, return the money within a reasonable time and may sue upon and enforce the original claim. ¹⁰The same is true of payment made in forged negotiable paper.

4. Payment in Property. ¹¹Where the parties in their contract so agree, a debt may be paid in personal property of any kind; and where it is in form payable in money, and the creditor takes as collateral security a chattel mortgage, and afterwards under that authority seizes the property, if it is sufficient in value, the debt will be paid. ¹²In case a contract provides for payment in specific personal property, if the debtor makes default in payment according to the terms of the agreement, the creditor need not afterwards accept the property, but may sue and recover damages *in money* for the breach.

5. Payment by Note. ¹³ When the seller of goods accepts from the purchaser his own note or check for the purchase price, it does not operate as a payment of the claim. ¹⁴ The only effect is that if the check is post dated or the note is payable at some future day, he must wait until that time before he can enforce his claim. ¹⁵ It does not destroy the original debt but defers the time of payment; and hence as soon as the note or check is due or payable he may ignore it, and sue upon the original debt, though if the note or check were negotiable he would have to return it to the maker, but he might do so upon the trial of his action. ¹⁶ If on the other hand the seller of the goods should accept from the purchaser at the time of the sale the note or draft of a third party it would amount to payment; ¹⁷ and even if it proved worthless and should never be paid, the purchaser is not liable. His debt is paid and the seller must lose it. It would be in effect an exchange of property, the goods being sold for the note, and the price of the goods being paid by the note. ¹⁸ The case is different, however, where the note or draft of the third person is taken on an existing indebtedness. ¹⁹ Here it will not generally amount to payment unless the creditor expressly accepts it as such, when of course it is payment, and extinguishes the debt; but in some instances the creditor may be held to an acceptance of it as payment, from the fact that he has transferred it, or neglects to present it for payment at the proper time and place. ²⁰ However, if not accepted as payment, it will operate to extend the time of payment of the debt until it becomes due, the same as though the creditor had taken the debtor's own note due at a future date.

6. Manner of Making Payments. ²¹ When no place of payment is named in the contract, it is the duty of the debtor, as has already been observed, to seek the creditor and pay him. ²² Of course this does not always mean the creditor in person, but any one who is duly authorized to represent him and receive payment. ²³ Where the case is in litigation, payment to the creditor's attorney discharges the debt; but payment to the attorney of a less sum than the amount due, or payment in anything except money, is not sufficient, unless the attorney has express authority to accept such payment. Any method of making the payment directed by the creditor, if complied with by the debtor, will discharge the debt. ²⁴ Where the creditor directs that the money be sent to him by any particular conveyance, as by express or mail, and the debtor carefully follows these instructions, he has paid the debt and will be discharged, although the money should never reach its destination.

7. Presumption of Payment. ²⁵ There are certain circumstances so convincing in their nature that they are held to constitute presumption of payment, unless overcome by direct and positive evidence to the contrary. ²⁶ The principal circumstances raising such presumption are, (1) possession by the debtor of his written agreement to pay, (2) possession of an order or draft by the person upon whom it is drawn, (3) possession of a receipt by the debtor, (4) Lapse of time, (5) Certain subsequent dealings between the parties.

(1) *Possession by debtor of agreement.* When the maker is sued to recover the amount of a note given by him, his possession of such note raises the presump-

tion that it has been paid. So does the possession of a check by the drawer. ²⁷ The reason of this is that in the ordinary course of business such an obligation when once made and delivered, does not return into the maker's possession until he has paid the debt.

(2) *Possession of Order or draft.* ²⁸ Exactly the same presumption arises, based upon a similar reason, when the person upon whom a draft or order is drawn requiring the payment of money or the delivery of property, has the paper in his possession.

(3) *Possession of Receipt.* ²⁹ The object in giving and taking a receipt is to furnish proof of payment; and it therefore constitutes evidence of great weight. ³⁰ It is strongly presumptive but not conclusive. ³¹ It may be attacked by parol evidence, showing that it was fraudulently obtained; or it may be explained in such manner as to destroy its effect, as where it is proved that it is incorrect, was erroneously given, or had some different meaning. A receipt is sometimes made in such form that it not only acknowledges the receipt of money or property, but at the same time embodies a contract. ³² In that case so far as it is a receipt it may be overcome by proof of error, or for any other reason that would destroy the effect of a simple receipt, but the contract embodied in it cannot be thus modified. The custom of taking receipts for all payments of money or delivery of property cannot be too much extended, or too fully observed, and once taken they should always be preserved. ³³ It is a creditor's duty to give a receipt on the payment of a debt, but generally he cannot be compelled by law to do so. ³⁴ Where he holds the debtor's note or other collateral security he must surrender it upon payment, and, as we have seen, this is equivalent to a receipt in the debtor's hands.

(4) *Lapse of Time.* ³⁵ Without regard to the statute of limitations, a long lapse of time tends to prove the fact of payment. All debts, even including specialties, may be presumed to have been paid after the lapse of twenty years, unless other circumstances are shown to overcome that inference.

(5) *The subsequent dealings of the parties,* often raise the presumption of payment. ³⁶ Where two persons have a running account between them, and one gives to the other his promissory note, that is held to be presumptive evidence of a settlement of their accounts up to the time the note was given. It is proof that the maker's claims were then adjusted, and that the other party was not indebted to him.

8. Application of Payments. ³⁷ Where a debtor is owing distinct debts to the same creditor, and makes a payment to him, a question often arises as to its application. In order to determine this, four general rules have been laid down covering the cases of most frequent occurrence. These are as follows, viz:

(1) ³⁸ Where all the debts are due when the payment is made, the debtor may apply it to any one he pleases, and if the creditor receives the money with a direction as to its application he is bound to apply it as directed; ³⁹ but he is not obliged to receive a partial payment upon a debt the whole of which is due.

(2) ⁴⁰ Where no express direction is given by the debtor, but the circumstances are such as to show his intention, it is deemed equivalent to an express direc-

tion. "Where the debtor pays a sum exactly equal to one of the debts it will be considered as indicating his intention to apply it to the payment of such debt.

(3) ⁴² If neither the circumstances nor the debtor's declarations show any intention on his part regarding the application, then the creditor may apply it to whichever debt he pleases. He may even apply it upon a debt barred by the statute of limitations, but such application will not revive the debt so the balance can be collected from the debtor, although he will be bound by application of the payment thus made.

(4) ⁴³ Where neither party applies the payment the law will make such application according to the presumed intention of the parties and the justice of the case. As a general rule in such cases, the court will apply the payment to the oldest debt due at the time the money was paid. If there are two debts, one lawful and the other illegal, the payment will be applied to the legal claim; and where the debt consists of principal and interest, the payment will be applied first to satisfy the interest and the balance to the reduction of the principal.

LESSON REVIEW.

1. In what are all debts payable unless otherwise specified?
2. Why called *legal tender*?
3. By what authority is money coined and its value regulated?
4. What are *greenbacks*, and when and how were they made *legal tender*?
5. What kinds of money in the United States possess the quality of *legal tender*?
6. What important kind of our currency has not that quality?
7. When will a tender made in national currency be legal?
8. What is the effect of payment in counterfeit money?
9. What is the creditor's duty?
10. To what other kind of payment does the same rule apply?
11. When may debts be paid in property?
12. What is the effect of a default in payment when the contract calls for payment in property?
13. Does an acceptance of the purchaser's note or check operate as payment?
14. What is its effect in regard to time of payment?
15. What upon the original debt?
16. Does acceptance of the note or draft of a third party amount to payment.
17. Does it in case the paper proves worthless and is never paid?
18. Is the rule different when the third party's obligation is taken on an existing debt?
19. When will it be considered as payment in that case?
20. What is the effect if not accepted as payment?
21. When no place of payment is named in the contract what is the debtor's duty?
22. Must he seek the creditor in person?
23. When may he pay the creditor's attorney? What amount must be paid to him?
24. When will money sent by mail or express by the debtor discharge his debt, whether received by the creditor or not?
25. What is meant by *presumption of payment*?
26. From what circumstances does this presumption arise?
27. Why does possession by the debtor of his note or check raise a presumption of payment?
28. From whose possession of an order or draft is payment presumed, and why?
29. Why does the possession of a receipt constitute strong evidence of payment?
30. Is it conclusive?
31. How may it be overcome?
32. How far does the same rule apply to a receipt embodying a contract?
33. Ought a creditor to give a receipt for money paid to him, and

may he be compelled to do so? 34. What is the rule as to the surrender of collateral after payment of the debt, and what is its effect? 35. What lapse of time outside of the statute of limitations constitutes presumptive evidence of payment? 36. From what subsequent dealings of the parties may payment be presumed? 37. When does the question of application of payments arise? 38. When may the debtor direct the application of a payment, and how does such direction bind the creditor? 39. When is the creditor not obliged to receive a partial payment? 40. What is the rule where the debtor's intentions are not expressed, but are indicated by circumstances? 41. Give an illustration. 42. What is the rule where the debtor gives no direction and the circumstances do not show his intention? 43. When and how does the law make application of payments?

LESSON XII.

1. (3) Accord and Satisfaction. 'Accord means *agreement*, and the expression *accord and satisfaction*, as used in the law, denotes an agreement by the parties to a controversy so executed that it amounts to a satisfaction of the debt or claim in question between them. 'A farmer enters into an agreement to deliver to a butcher three head of beef cattle at a certain price, but fails to do it. The butcher is injured by the farmer's failure to perform his contract, and consequently has a claim against him for damages; but it is finally agreed between them that the farmer shall pay ten dollars to settle the matter. This constitutes an *accord executory*. 'The farmer actually pays the money, and then the *accord* is *executed*. 'An accord executed is a good defense, but an accord executory is not. If partly executed it is a satisfaction only so far as it is accepted.

'A mere promise to do another thing is not a satisfaction, unless it is agreed by the parties that the new promise shall itself be a satisfaction of the prior debt and the new agreement is based upon a good consideration. 'In the last illustration, suppose the butcher had agreed to accept in full satisfaction of his claim for damages the farmer's promise to take twenty-five dollars worth of meat of him at the regular prices during the succeeding six months, and the farmer had made such promise, this, although an accord executory, would constitute a good defense to an action brought for the damages, because here the new promise itself is accepted as a satisfaction. 'If, on the other hand, the farmer had made the same promise and the butcher had agreed to release his claim for damages upon the fulfillment of the agreement, then it would be the *performance* and not the *promise* that was accepted, and therefore there would be no satisfaction until performance was completed.

2. Part Performance. 'Payment of a less sum than the undisputed amount due on a debt, though accepted in full, does not generally constitute ac-

cord and satisfaction. ⁹ But a debtor may offer anything as a substitute for the money due, whether of less or greater value, and if the creditor take it in satisfaction it is a valid agreement and the debt is discharged. He may give a chattel worth only one dollar in satisfaction of a debt of a thousand dollars. The obligation of a third person for any amount, accepted as satisfaction by the creditor, operates in the same way to discharge the debt. Upon the same principle, where the creditor has agreed to receive a less sum in payment of a greater, and accepts the negotiable draft of a third person for a part of the less sum, it satisfies the original demand. ¹⁰ Where the amount of a claim is disputed or its existence is questioned in good faith, and upon part payment a receipt is given in full, this operates as a binding accord and satisfaction. So also does a payment receipted in full for damages caused by an injury.

3. Composition Deed. ¹¹ The creditors of an insolvent debtor sometimes enter into an agreement with him called a *composition deed*, by which, upon payment to each of some fixed proportion of his claim, they all agree to release the debtor from the balance of their claims. ¹² In this case, also, the partial payment of the original debt, that is the payment of the amount provided in such deed, satisfies and discharges it, unless it be shown that the deed was procured by fraud or upon some condition not fulfilled.

4. Merger. ¹³ Where a higher security is taken in place of a simple debt, the latter is said to be *merged* or swallowed up in the former, and therefore extinguished, unless it is clearly understood that the new security is taken only as collateral. ¹⁴ A specialty is a higher grade of security than a parol contract; hence when a creditor to whom a customer owes a book account takes from his debtor a bond for the amount of the indebtedness, the original debt would thus be merged in the higher security, and no action could be sustained upon it. The creditor's remedy thereafter must be upon the bond.

¹⁵ A judgment is a still higher security and merges the debt upon which it is recovered. A note or a bond upon which suit has been brought and judgment entered is extinguished and is afterward of no value whatever.

¹⁶ But where the higher security, as a mortgage, is taken as collateral security for the payment of a debt, it does not merge it, and hence does not satisfy the right of action. It is only an additional security, and the debtor is entitled to have it returned to him when he pays the debt.

5. Release. Accord and satisfaction may be evidenced by a release. ¹⁷ This is properly an instrument in the general form of a deed, that in distinct terms remits the claim to which it refers; and being under seal, although reciting only a nominal consideration, extinguishes the debt. In this respect the release differs widely from a receipt. ¹⁸ The former by its own operation extinguishes the debt, and cannot be contradicted or explained by parol evidence, while the latter, as has been shown, is merely presumptive evidence of the fact of payment, and may therefore, be refuted or explained by parol. ¹⁹ The term is not always used, however, in its technical sense, and is sometimes applied to the parol discharge of a debt.

²⁰ The general rule is that while a parol agreement may be released by parol before breach, a sealed contract requires a sealed release; ²¹ but a specialty may be discharged by a parol agreement if fully executed, though if any part remains unexecuted, so that the accord is not complete, it will not operate as a discharge.

6. Material Alterations. ²² The alteration, by erasure or interlineation, of a contract, so as to change its legal effect, when made by one party without the consent of the other, renders it void. ²³ If the alteration is made before execution, it will not generally affect the validity of the instrument, hence the question of presumption as to when an alteration was made is important. ²⁴ In some states an erasure or interlineation will be presumed to have been made before or at the time of execution. In other states, the party suing must give some explanation of the alteration, especially if it makes the instrument more favorable to the party in whose possession it has been.

²⁵ Where the alterations are wholly immaterial, they will not avoid the instrument; ²⁶ but whether material or not, if made before execution, that fact should be distinctly stated at the close of the contract, in order to avoid all question as to its effect.

7. (4) Arbitration and Award. ²⁷ Where a controversy has been submitted to persons chosen by the parties to settle their dispute, and who are called *arbitrators*, their *award* or decision binds the parties. ²⁸ It merges the original demand. ²⁹ If, however, the arbitrators should act outside of the terms of the agreement by which the controversy was submitted to them, their award would not be binding, because such submission is the source of their authority, and their power ends with its provisions.

³⁰ It is quite customary, particularly in building contracts, and also in some other agreements, to introduce a clause providing that in case of dispute between the parties, the matters in controversy shall be submitted to arbitration, but a failure to carry out this provision constitutes no defense to an action upon the contract. Neither party is bound to pursue his remedy against the other in that way, but may disregard that part of the agreement, and take the case directly to the courts by an action.

8. (5) Pendency of Another Action. ³¹ It is not the policy of the law to encourage litigation, hence it does not permit any one to bring more than one suit at the same time for the same cause of action. ³² Therefore, while the pendency of a former action does not amount to a defense upon the merits, that is does not deny or controvert the facts upon which the later action is founded, it does operate as a defense by way of suspending or abating such action. ³³ But the pendency of a former action in another state, or foreign country, will not operate as such defense.

In order to have this plea sustained, it must be shown that the former suit was pending when the latter was commenced. ³⁴ The requirement that the two actions must be for the same cause, is strictly enforced, and it is not enough that the same property is in controversy in both actions. ³⁵ The test generally applied to determine the identity of the causes of action in question, is whether the same

evidence would support both. ³⁶ Hence it has been held that the pendency of actions for rent alleged to be payable quarterly, was no defense to an action for the same rent under a claim that it was payable at the end of the year; and an action pending upon a note is not a bar to an action on the mortgage securing it. ³⁷ The parties to both actions must also be the same. ³⁸ An action by a judgment creditor to set aside a conveyance made by a judgment debtor, is not a bar to an action by another judgment creditor against the same defendant for the same purpose, where there is no privity between them.

9. (6) Tender. ³⁹ This is defined as an offer of a sum of money in satisfaction of a debt or claim, by producing and offering the amount to the creditor and declaring a willingness to pay it. ⁴⁰ Tender really admits that there is due the amount offered, hence it is only a defense to any claim for costs or damages beyond the sum tendered. ⁴¹ Thus, where one owes a debt of fifty dollars, and makes a legal tender of that sum to his creditor, it is a good defense to any claim for further interest, or damages by way of costs of an action to collect the claim. ⁴² In order to operate as such defense, the tender must be kept good, that is, the answer must express a continued willingness to pay the amount, and the money must be brought into court, and deposited with the proper officer. ⁴³ As appears from the definition of tender, the actual production of the money is necessary, unless the creditor absolutely refuses to receive it, and thus dispenses with that formality. No condition can be imposed upon the acceptance of the money. ⁴⁴ The offer must be absolute, without even a demand for a receipt, except in the case of negotiable paper, the return of which may be demanded. ⁴⁵ Such offer of payment is only legal as a tender when made in money that has the quality of legal tender (p. 46, sec. 1), unless the creditor waives that requirement. ⁴⁶ The tender must be for the whole amount of the debt, unless the claim is made up of separate claims, as two or more promissory notes, when it may be made upon one of them by distinctly indicating it. ⁴⁷ Where a creditor holds collateral securities for the payment of a debt, a tender of the amount due releases the securities. ⁴⁸ In the case of a note, or bond and mortgage, the bond or note represents the debt, and the mortgage is a collateral security for its payment, hence a tender of the amount due on the bond or note will discharge the mortgage and relieve the land covered by it from the lien.

⁴⁹ Where the claim is in favor of several persons jointly, as the members of a copartnership, a tender to any one of them is sufficient.

10. Place. ⁵⁰ The rule is that the debtor must seek the creditor wherever he may be found within the state, and make the tender to him, unless the contract provides for payment or performance at some particular place, when the offer must be made at such place. ⁵¹ But in case no place is named for payment, and no person is authorized by the creditor to receive it, and he should purposely absent himself to avoid receiving the money, then a tender made at his residence to a person in charge, would be valid. ⁵² Where no place for the payment of rent is named in the lease, it is due at the premises, and hence a tender of the amount at that place is sufficient.

11. Tender of Property, &c. ⁵³ The term *tender* is also used to indicate

an offer to deliver property or securities, or to perform services called for by a contract. ⁶⁴ In that case no formalities are required, and an honest offer of performance is sufficient. ⁶⁵ If the debtor is a manufacturer, and no place of delivery is named, it will be presumed that the creditor was to take the manufactured articles at the debtor's place of business, and a tender of them there is sufficient. ⁶⁶ Otherwise the residence of the creditor will be deemed the proper place of delivery, unless the property be too heavy or unmanageable to be readily handled, and in that case, if no place of delivery is agreed upon, and the creditor refuses to designate a reasonable place, the debtor may choose a place reasonably convenient for the creditor and there deliver the property.

LESSON REVIEW.

1. What is the meaning of *accord and satisfaction*?
2. Give an illustration of an *accord executory*.
3. When does it become *executed*?
4. Which constitutes a good defense?
5. When is the mere promise to do a thing a *satisfaction*?
6. Give an illustration.
7. Vary the illustration to show when performance alone amounts to satisfaction.
8. What is the rule as to part payment amounting to *accord and satisfaction*?
9. What is the effect where the creditor accepts specific articles of property as a substitute for money? Does the value of the article affect the result?
10. When does part payment operate as a binding accord and satisfaction?
11. What is a *composition deed*?
12. What is the effect of payment of a less sum than the debt, made under it?
13. What is *merger*, and what is its effect upon the lower security?
14. Give an illustration.
15. Give a further illustration.
16. When is the lower security not merged in the higher?
17. What is a *release*?
18. How does it differ from a receipt?
19. How otherwise is the term release used?
20. What is the general rule in regard to the release of parol agreements and contracts under seal?
21. When may a specialty be discharged by a parol agreement?
22. When will an alteration render a contract void?
23. Why is the presumption as to when an alteration was made important?
24. How does this presumption differ?
25. What alterations will not usually avoid a contract?
26. How should all question as to the effect of such alterations be avoided?
27. Who are *arbitrators*, and what is meant by their *award*?
28. What is the effect of such *award*?
29. When is an arbitration and award not binding, and why?
30. Does an agreement in a contract to submit differences to arbitration, prevent either party from bringing an action?
31. What is the policy of the law in regard to litigation?
32. How does it result?
33. Has the pendency of a former action in another state the same effect?
34. What are the requirements to constitute the pendency of another action, a good defence?
35. What is the test of identity of the causes of action?
36. Give two illustrations showing want of identity.
37. Must the parties be the same in both actions?
38. Illustrate application of the rule.
39. What is *tender*?
40. What does it admit, and how far is it a defense?
41. Give an illustration.
42. What is meant by keeping the tender good?
43. How must a tender be made?
44. To what extent must

the offer be absolute? 45. In what money made? 46. What is the rule as to the amount that must be tendered? 47. What effect has a tender upon collateral securities? 48. Give an illustration. 49. Is tender to one of several joint debtors sufficient? 50. What is the rule in regard to place of tender? 51. Where may tender be made if no place is designated and the creditor absents himself? 52. What is the law in regard to the tender of rent? 53. How otherwise is the term *tender* used? 54. What are the requirements of such tender? 55. Where may a manufacturer tender his work? 56. What is the rule in regard to very heavy or unmanageable property?

LESSON XIII.

1. (7) Statute of Limitations. ¹ This requires an action to be commenced within a certain time after the demand has arisen. ² It *limits* the time to sue, and hence is called the *statute of limitations*. ³ This statute does not make a claim void but simply suspends the remedy. It virtually says to a creditor, you may have a certain number of years within which to collect the amount of your claim, but if you neglect to do so, the law will not assist you to enforce payment after that time. ⁴ The policy of this statute rests upon two general considerations. The first and older one was that the lapse of a certain time was evidence that the claim had been paid or the title perfected; and the second and later one is to prevent the revival and litigation of old and stale claims. This statute is somewhat different in the various states in regard to the length of time within which suit must be brought upon the specified classes of demands. ⁵ But whatever time may be fixed, when it has expired any action upon the claim is said to be barred by the statute of limitations, or, as it is commonly expressed, the claim is *outlawed*. ⁶ In most of the states demands arising out of contracts not under seal, such as promissory notes, book accounts, and the like, are outlawed after six years. In regard to other classes of claims there is more difference in the time allowed for collection, and therefore resort must be had to the statutes of the particular state, for more exact information in any given case. ⁷ The fact that an action upon the claim itself is barred by the statute of limitations, does not affect the right of the creditor to enforce any collateral security he may have taken. ⁸ Where one has given a note and to secure its payment has also turned over to his creditor a mortgage upon real estate, although the note could not be collected after it had remained due more than six years, yet the creditor would be entitled to foreclose the mortgage and satisfy his claim out of the proceeds of the sale of the land.

2. 'The Statute Begins to Run from the time an action might have been begun. ¹⁰ As has been said, a promissory note outlaws in most states in six years, from the time when the holder could have sued upon it, that is after it

became due. ¹¹ In the case of a claim for services the statute would run from the time when they were completed, unless the services extend through a long period of time without any special agreement. The law would then imply a hiring from year to year and the statute would begin to run, as to the claim for each years' services, from the end of that year. ¹² The right of action to recover a balance due upon a running account where each party has been from time to time furnishing specific articles, or paying money to the other, begins at the date of the last item in the account.

¹³ The time limited for the commencement of an action, begins with and includes the day upon which the right to sue arose, without reference to the fractions of a day. ¹⁴ Where goods are bought on the first day of April on a credit of sixty days, the purchase price will be payable the thirty-first day of May, but the buyer has all of that day in which to pay the bill, and hence no right of action arises in favor of the seller until the next day, and suit must be brought on or before the thirty-first day of May in the sixth year thereafter. But this statute does not always begin to run at the date when the debt becomes due, and it is sometimes suspended after it has commenced to run.

3. Disability of the Creditor. While the policy of the statute of limitations was to prevent the revival and litigation of state claims, it is equally the intention of the law to give the creditor the full time thus provided within which to enforce collection of his claim. ¹⁵ It was therefore provided by the English statute that if the creditor, at the time when the cause of action accrued, was an infant, married woman or lunatic, or was imprisoned or out of the country, he might bring his action at any time within six years after the disability ceased or was removed. ¹⁶ It is held, however, that the disability must actually exist when the right of action arises, and that in case it should begin afterwards it would not suspend the running of the statute. ¹⁷ It has been similarly decided that where a creditor is absent when the cause of action accrues, and returns even temporarily, the statute begins to run, and its operation will not be suspended by his further absence; ¹⁸ and that where one of several joint creditors who were abroad returns, the six years begin as to all from the date of such return. ¹⁹ In case two or more disabilities exist in the same person, the statute does not begin to run until all are removed. ²⁰ In some states the creditor's absence, when the cause of action accrues, does not prevent the running of the statute.

4. Absence of the Debtor. ²¹ The same purpose of the law to give the creditor his full time to bring an action, led to the enactment of a statute in England that where any person against whom there existed a cause of action, should be "beyond seas" when it accrued, then the action might be brought at any time within six years after his return. ²² Both this and the statute referred to in the last preceding section have been substantially reenacted in this country. ²³ The words "beyond seas" are used in both to denote absence from the country, and when the same or a similar expression is used in the statutes of the various states it has been generally held to mean absence from the particular state. ²⁴ Under this provision as embodied in the statutes of some of the states, it is enacted that if the debtor should be absent from the state after the right of

action accrues, the time of such absence would not be counted against the creditor; and this has been construed to admit of adding the time of successive absences and deducting the same from the whole period between the time when the action accrued and suit was begun, and if the balance was less than six years the action was not barred.

5. New Promise. ²² The moral obligation to pay a debt barred by the statute of limitations is just as great as it was at any time while the claim could be enforced. The debt is not extinguished because, as has been said, the statute merely suspends the remedy, and does not declare the cause of action void. ²⁶ Hence a new promise to pay is sufficient to revive the original liability; and this is so even without any new consideration, the moral obligation being considered sufficient to support the new promise. ²⁷ The English statute provided that in order to take a case out of its operation the new promise must be in writing and signed by the debtor; and a similar requirement is found in the statutes of some of our states, while in others a mere verbal promise is sufficient. ²⁸ A simple acknowledgment of the debt is not sufficient, as where one says, "I know that I owe the money, but have a legal defense and will not pay it." ²⁹ It must be such a distinct admission not only of the debt but of the legal liability to pay it, as will authorize the inference of a new promise to pay, as where an executor made and signed an inventory of the testator's estate in which he set forth as assets certain notes made by himself to such testator, and which were then outlawed. ³⁰ The acknowledgment may be made conditional upon the happening of some event, and in that case it becomes a new promise, when the creditor shows that the condition has been performed.

6. Part Payment. ³¹ A voluntary payment of principal or interest will take a debt out of the operation of the statute, to the time of such payment. Of course from the date of each part payment, or binding new promise, the statute commences again to run for the full period, as if the debt were a new one upon which the right of action then first accrued. ³² This revival of an outlawed claim by a part payment rests upon the theory that when a debtor makes a voluntary payment upon his debt he thus recognizes its validity and indicates his purpose to pay the same. Hence such payment is said to constitute evidence from which a new promise to pay will be implied. ³³ The payment may be made with the same effect in personal property, where it is agreed that such property shall be given and accepted as payment; ³⁴ and even where the debtor gives his creditor his promissory note for a part of the original debt with a distinct understanding that it is made as a payment upon the original demand, it will operate as a part payment and revive the debt. ³⁵ This, however, depends upon the understanding to that effect being *distinct*, as no presumption will arise in favor of there being any further payment at any time intended than the amount of the note.

³⁶ A part payment can of course only revive a debt when made by the debtor himself or by some one who has authority to bind him in that manner. Such payment made by a stranger, or a person without the debtor's authority, will not have that effect. It is held in some states that a part payment by one of several joint debtors will not take the debt out of the statute as to the others.

7. Set-Off. ³⁷ Where one person sues another upon some demand, and the defendant at the same time has a claim against the plaintiff upon which he might sue, a natural sense of justice dictates that such defendant should be allowed to *set off* his claim against that of the plaintiff. It follows therefore that the practice of allowing a set-off originated with courts of equity, but it has been adopted and defined by law, and has thus become in large measure a statute defense. ³⁸ Set-off is therefore a cross demand, or as it is sometimes called a *counter-claim*. ³⁹ The debts need not be of the same nature. A claim secured by a bond or judgment may be set off against a simple contract debt, and a simple contract debt against one thus secured. ⁴⁰ But the debts must be mutual and due to and from the same parties in the same capacity. Where the plaintiffs are copartners the defendant cannot set off a debt due to him from one of them individually, nor if the plaintiff were one of a firm, could the defendant set off against his claim a debt due from the copartnership. If the plaintiff should sue as trustee, executor, or in any other representative capacity, the defendant could not set off a debt due from him individually.

8. "Recoupment" is defined as a reduction or diminution of damages in an action on contract, for breach of warranty or defects in performance. ⁴² A person sells a horse, warranting him sound and right every way, while he knows such is not the fact, and afterwards brings an action for the purchase price: the buyer may set up the breach of warranty in his answer and recoup his damages. The effect of this is that the plaintiff gets the amount of his legal claim, after deducting the amount representing the damages caused to the defendant by the breach of warranty. ⁴³ Recoupment therefore operates to diminish the amount of the plaintiff's recovery. ⁴⁴ The defendant cannot show that his damages are greater than the plaintiff's claim, and have a judgment against the plaintiff for the difference as he might in the case of a set off. ⁴⁵ It is, however, like set-off in that it is substantially a right of action in favor of the defendant and against the plaintiff, which he need not interpose as a defense, but may enforce in a separate action. ⁴⁶ In the New York Code of Civil Procedure and in the statutes of some other states *counterclaim* includes both *set-off* and *recoupment*, and at the same time enlarges the scope of that class of defenses.

LESSON REVIEW.

1. What does the statute of limitations require?
2. Why called *statute of limitations*?
3. How does it operate upon the claim?
4. Upon what considerations does the policy of the statute rest?
5. What is the meaning of *barred by the statute of limitations*? What other term is used?
6. When is a simple debt *outlawed* in most of the states?
7. Does the barring of a claim by the statute affect a creditor's rights under his collateral security?
8. Give an illustration.
9. When does the statute begin to run?
10. When in case of a note?
11. When in a claim for services?
12. When in a running account?
13. Does the running of the statute include the day upon which the right of action arises?
14. Give an illustration.
15. What disabilities of

the creditor prevented the running of the statute in England? 16. When must the disability exist, and would its later occurrence affect the running of the statute? 17. What is the effect of the temporary return of an absent creditor? 18. What is the effect in case he is one of several joint creditors? 19. What is the rule where two disabilities exist in the same person? 20. Is there any exception to the rule in regard to creditor's absence? 21. What was the effect of the debtor's absence under the English statute? 22. What is the source of our statute of limitations? 23. What is the meaning of "beyond seas" and similar expressions used in this statute? 24. How are successive absences of the debtor sometimes treated? 25. Does the statute affect the moral obligation to pay a debt? 26. How does this operate in case of a new promise to pay? 27. What requirement did the English statute make in regard to the new promise? 28. Is a mere acknowledgment of the debt sufficient? Give an illustration. 29. What kind of an acknowledgment is sufficient? 30. What is the rule in regard to conditional acknowledgments? 31. What is the effect of a part payment? 32. Upon what theory does this rest? 33. Must the payment be made in money? How otherwise? 34. When will the debtor's own note operate as part payment to revive an outlawed debt? 35. What must be the nature of the understanding in that case? 36. By whom must the payment be made? 37. When is the right of set-off allowed? 38. What is *set-off*? 39. Must the debts be of the same nature to admit of *set-off*? Give an illustration. 40. What requirements are necessary? Give illustrations. 41. Define *recoupment*. 42. Give an illustration. 43. How does recoupment operate? 44. How does it differ in that respect from *set-off*? 45. How does it resemble set-off? 46. What term is sometimes used to include both?

LESSON XIV.

DAMAGES.

1. Compensation for Breach of Contract. When a party to a contract fails in the performance of its requirements, such failure, as we have seen, is a *breach* of the contract. ¹ Every man ought to do as he agrees; but he may break his contract and in most cases the law will only compel him to pay a certain sum called *damages* as compensation to the party injured, though other remedies are sometimes applied. ² In actions upon contract the law does not proceed upon the theory of punishment, but prescribes the rule of damages solely with a view to indemnify the injured party, and hence the damages depend largely upon the nature of the contract. ³ The general rule is that in an action on a breach of contract, the party in default is liable to the other party for such damages only as *naturally* result from the breach, or which may fairly be supposed to have

been within the contemplation of the parties, when the contract was made, as the probable result of its breach.

2. In Contracts for the Payment of Money. ⁴ Where suit is brought upon a contract for the payment of money and the plaintiff succeeds, he will recover the amount due, with interest at the legal rate, from the date when it became due. This is not strictly speaking interest, but is an amount equivalent to interest allowed as damages for the injury caused by the debtor's failure to pay the money according to his agreement. ⁵ It is not in every case full compensation for the injury, but generally it is, since the use of money is supposed to be worth what the law of the particular State has fixed as the legal rate of interest, and therefore it is considered the proper measure of damages in such cases.

3. In Contracts for the Purchase of Goods. ⁶ When the seller of goods fails to deliver them according to agreement and the purchaser brings an action for damages; he recovers the difference between the purchase price and the market value of the same kind of goods at the time specified for their delivery, with interest from that date; ⁷ and in case the purchaser has paid the money for the goods, he recovers the value of the goods on the day fixed for their delivery, with interest.

⁸ When a buyer without cause refuses to accept the goods purchased by him, the seller may adopt one of three methods, viz.: (1) he may store or retain the property for the purchaser, and sue him for the entire purchase price; (2) ⁹ he may resell the property in the manner best calculated to produce their value, and recover the difference between the contract price and the price obtained on such resale; ¹⁰ or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price.

4. In Contracts for the Sale of Lands. ¹¹ When the vendor in a contract for the sale of land acts in good faith, and is unable to give a good title, the purchaser recovers only *nominal damages* beside what he may have paid on the contract. Very many cases arise in which the law only allows nominal damages. ¹² From this it is to be understood that while the plaintiff has a legal cause of action, yet he has suffered no actual loss or injury, and hence is given a sum so small that it amounts to damages in name only. *Nominal damages* therefore are those given for the violation of a right from which no actual loss has resulted. This being the rule for the measure of damages, the parties to contracts for the sale of real estate frequently do and generally ought to liquidate the damages (sec. 6) to be paid in case of a breach.

5. In Actions for Services. ¹³ In case an employee is discharged without his own fault before the term of his service is completed, he may recover as damages whatever loss he sustains. If he cannot get other work he may recover the full amount of wages he would have received if he had continued in his employment. ¹⁴ If he gets other work and earns a part of what he would have been entitled to under his first employment, the sum so earned will be deducted from the whole amount of wages he would have received under the contract, and the

balance will be the damages sustained by him. ¹⁶The law will not presume, however, that he might have secured other work; but it has been held that the employer may show that he could have secured other employment of the same kind in the same locality, which he refused, and in that case reduce his claim for the full amount of wages under the contract. In any case the employee is entitled to recover interest upon the damages allowed from the time such sum should have been paid.

¹⁶The same rule of damages applies under a contract for freighting a vessel. The ship is not at liberty to lie idle at the dock or to start off on her voyage without a cargo. The master of the vessel must take another cargo if offered, and may collect from the parties contracting to furnish the original cargo, the contract price for freight, after deducting the amount actually received for transporting the substituted cargo.

6. Liquidated Damages. ¹⁷In some contracts the parties themselves fix in advance the measure of damages for its breach. They agree upon a sum of money which either one failing to perform his part of the agreement shall pay to the other, and insert it in the contract. This sum is termed *liquidated damages*. ¹⁸In such cases if the intention of the parties is clear, either from the language of the contract, or the circumstances, the law will generally respect their agreement, and in an action for breach of the contract by either, will award such damages as they have stipulated. ¹⁹The parties sometimes name in the contract a sum that shall be forfeited by either party failing to perform his part of the agreement. This constitutes a *penalty* under which the injured party recovers his *actual* damages, up to the specified amount. ²⁰On the other hand where the damages are liquidated, the full amount will be awarded the injured party, although the breach may have been so slight as to cause very trifling injury, and may thus result in great hardship to the other party. ²¹Therefore where there is any doubt as to the intention of the parties, the tendency of the courts is to adopt that construction which makes the sum stated a *penalty* rather than *liquidated damages*. ²²And even where they call it liquidated damages it will be treated as a penalty if from the whole tenor of the agreement it appears that they intended it as such; or in case the damages for the breach are capable of exact ascertainment, and the sum fixed is disproportionately large, then it will be construed as a penalty.

7. Remote Damages. ²³As we have seen, the rule is that one breaking a contract is only liable for the injury that *naturally* results from the breach. This would be such as resulted directly from the wrong. It follows then, that *remote* or *consequential* damages are excluded, and such is the rule. ²⁴A debtor fails to pay the money he owes at the agreed time, and the creditor who has relied upon this to meet his obligations, is financially embarrassed, and his business ruined. This is the result of the debtor's breach of his contract, and yet it is in the contemplation of the law *remote*, or *consequential*. ²⁵The direct injury lies in the fact that the creditor does not have the money to use for some definite time after it became due, and for this, as has already been shown, he is entitled to recover as damages, beside the amount of the debt, interest thereon

at the legal rate, from the date when the money was due until the time it is collected.

8. Speculative Damages. ²⁶ Nor will the law permit the recovery of *speculative* or *uncertain* damages. ²⁷ In the case of a delay in the performance of a contract to repair a vessel, the resulting damages are what might have been received for a charter during the time of the detention, and not the speculative profits of navigating the vessel during the period of such delay.

²⁸ But in case gains would have accrued that are capable of being definitely ascertained, their equivalent may be recovered in damages. ²⁹ Where a dealer sold cabbage seed and warranted the same to be Bristol cabbage seed, and that such seed would produce Bristol cabbages, upon a breach of such warranty the buyer was permitted to recover as his damages the value of a crop of Bristol cabbages such as would ordinarily have been produced that year, after deducting the expenses of raising the crop, and also the value of the crop actually raised.

9. In Actions of Tort. ³⁰ *Tort* means wrong or injury, and is used to denote any wrong or wrongful act for which an action will lie, as distinguished from *contract*. ³¹ The general rule is, that in such actions the damages should be a just compensation for the injury. ³² Where a mill fills the stream and a dam below with waste material, the owner of such dam may recover as damages the expense of removing the deposit.

³³ In actions for the wrongful taking and conversion (*i. e.* appropriating to one's own use) of personal property, the owner recovers the market value of the property at the time of the conversion, with interest upon the same from that date. In actions for the conversion of securities, such as bonds, notes, or stocks, the owner is entitled to recover their value, and the face of the security will be presumed to indicate its value.

³⁴ In actions for the recovery of property, called actions of replevin, where the use of the property has a definite value, the plaintiff may recover the value of such use as damages for the detention, and where a return of the specific property cannot be had, the plaintiff recovers its value at the time of the trial, with damages for any injury done to the property.

10. ³⁵ Exemplary Damages, sometimes called *vindictive damages*, and commonly referred to as *smart money*, may be recovered for willful injuries. ³⁶ They are allowed on the ground that an offense may be so great that the offender ought to be made an example of, and be compelled to pay more than the actual loss or injury caused by his act, hence such damages when allowed are properly called *exemplary*. ³⁷ Such damages are never allowed for simple breach of contract, and are only authorized when the wrong complained of was willful or malicious.

11. ³⁸ But One Recovery can be had upon a contract that is entire. The claim cannot be split up and several actions maintained for the same cause. ³⁹ Where, however, there is an agreement for the performance of specific and independent acts, in a continuing contract, as the covenant in a long lease to pay

the amount of taxes on the premises, one recovery does not bar a second action under the same agreement.

LESSON REVIEW.

1. What is meant by the term *damages*? 2. Upon what theory does the law proceed in actions on contract? 3. What is the general rule for awarding damages in such cases? 4. What is the rule in actions on contract for the payment of money? 5. Upon what ground has this measure of damages been established? 6. What is the rule in sales of goods, when the purchase price has not been paid? 7. What is the rule when it has been paid? 8. How many courses are open to the seller in case the buyer refuses to accept goods, and what is the first? 9. What is the second? 10. What is the third? 11. When are *nominal damages* allowed in cases of sale of real estate? 12. What is meant by *nominal damages* and when in general allowed? 13. What is the rule of damages in actions for services? 14. What in case the employee secures other work? 15. Will it be presumed that he might have obtained other employment? What may the employer show? 16. How is the rule applied to the freighting of a ship? 17. Define *liquidated damages*. 18. When will such stipulated damages be awarded? 19. What is a *penalty*? How are damages awarded under such a provision in the contract? 20. How may the award of liquidated damages result in hardship? 21. What tendency grows out of this fact? 22. In what two cases will it be held that a *penalty* was intended where the words *liquidated damages* are used? 23. What is the rule as to *remote* or *consequential* damages? 24. Illustrate the meaning of *remote damages*. 25. What would be the direct damages in the same case? 26. Are *speculative damages* allowed? 27. Give an illustration. 28. When may prospective gains be considered in awarding damages? 29. Give an illustration. 30. Define *tort*. 31. What is the rule of damages in cases of tort? 32. Give an illustration. 33. What is the rule in actions for the conversion of personal property? 34. What is the rule of damages in actions for the recovery of property? 35. How are exemplary damages commonly referred to? 36. Why called exemplary? 37. Are exemplary damages allowed for simple breach of contract? 38. When can there be but one recovery? 39. When is one recovery not a bar to an action under upon the same contract?

LESSON XV.

NEGOTIABLE PAPER.

1. Necessity. Merchants early found it necessary in their transactions to have some convenient symbol by which to represent values, and out of this grew the invention and use of negotiable paper. ¹Its employment can be traced back at least five hundred years, and its use has been continually increasing with the growth of commercial transactions to the present time. We should naturally consider, then, that the law of negotiable paper must be a statement of the customs and usages of merchants, and such is the case. ²It is peculiarly true of this branch of commercial law, that it is a *growth* from the trunk of contracts; for, compared with other divisions of the law, very little has been added by way of legislative enactment.

2. Kinds of Negotiable Paper. ³The forms or kinds of *negotiable paper* that we shall here mainly consider are:

1. Bills of exchange. $\left\{ \begin{array}{l} 1. \text{ Foreign.} \\ 2. \text{ Inland.} \end{array} \right.$
2. Promissory notes.
3. Checks.

3. Origin of Bills of Exchange. ⁴The *foreign bill of exchange* is the oldest form of negotiable paper, and it is easy to see how naturally circumstances must have suggested its employment as soon as the conditions of trade required it. Its earliest use has been traced to the traders along the Mediterranean Sea; ⁵hence we will suppose that A, a merchant of Tyre, had shipped to B, doing business at Alexandria in that early time, a quantity of cloth and dye stuff, worth what would be equivalent now to five thousand dollars, and at the same time his neighbor, C, had ordered from D, another merchant of Alexandria, a cargo of wheat and spices of a like value. The condition of affairs then was this: B owed A the equivalent of five thousand dollars, and C owed D the same amount. Now, in order to discharge the indebtedness by direct payment, B's money must be shipped from Alexandria to A at Tyre, while C must ship the same amount from Tyre to D at Alexandria. This, of course, would involve double cost of transportation, waste of time and danger of loss. But, instead, A simply requests B, in writing, to pay C the amount in question. C then pays the money to A, takes this writing, adds his indorsement, directing B to pay the amount named to D, and sends it to D, who takes it to B and receives the money from him. Thus A and D, who sold goods, have received their pay for them, and B and C, who bought, have paid the purchase price, and yet no money has been carried between Tyre and Alexandria.

4. Definitions and Explanations. ⁶We may readily see from the case supposed in the last section that a *bill of exchange* is a direction in writing by the person who signs it ordering the one to whom it is addressed to pay a third person a definite sum of money at a specified time. ⁷If drawn upon a person residing in a country different from that in which the person drawing it resides, it is a *foreign bill of exchange*; but if drawn by one person upon another residing in the same State or country, it is called an *inland bill of exchange*. ⁸The *inland*, or as it is sometimes called, the *domestic bill of exchange*, is now, almost without exception, spoken of as a *draft* among business men, while its original name survives mainly in the pages of law books. The term *draft* is also applied to some extent to *foreign bills of exchange*. The following is a usual form for an *inland bill of exchange*:

Form No. 1.

\$1,000.	<p style="text-align: right;">SPRINGFIELD, Ill., April 15, 1887.</p> <p style="text-align: center;"><i>Sixty days after sight pay to Hunt & Helm or order, one thousand dollars, value received, and charge the same to my account.</i></p> <p style="text-align: right;">D. D. KNETTLES.</p> <p style="text-align: left;">To ELWOOD S. JONES, Chicago, Ill.</p>
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¹⁰The three parties concerned in a bill of exchange are designated as the *drawer*, that is, the person who draws or makes the bill; the *drawee*, that is, the person upon whom it is drawn, who is directed to make the payment; and the *payee*, that is, the person to whom the payment is directed to be made. ¹¹In the foregoing form Knettles is the *drawer*, Jones the *drawee*, and the firm of Hunt & Helm the *payee*.

5. Form. ¹²This bill is drawn payable "sixty days after sight," which means that it will become due sixty days after Jones *sees* it, or, in other words, after it is presented to him. ¹³Many drafts are drawn *at sight*, and therefore called *sight drafts*, in which case they are payable at once upon presentation, unless the law of the place where they are payable allows days of grace on such drafts, as is the case in some of the States; and in that event they will be due three days after presentation. Other drafts are made payable a certain number of days after date, and still others on demand. The last have no days of grace.

It will therefore be seen that no particular words are necessary to constitute a draft, provided none of the *requirements* be omitted. To render bills of exchange or notes negotiable they must be drawn in a negotiable form. ¹⁴They are so drawn when payable to O. P. *or order*, O. P. *or bearer*, or generally to *the bearer*. These words, or words of a like meaning, imply an authority to transfer the note or draft as a negotiable instrument. Business men now use,

almost without exception, printed blanks for drafts, notes and checks. These are usually bound in book form, and are detached singly as wanted.

***6. Transfer.** ¹⁵The *drawer* delivers the bill to the payee on his debt due to the payee. It very often happens that the payee wishes to use the bill to pay his own debt to some other party. Suppose Hunt & Helm are owing Henry French one thousand dollars, and indorse over the bill to him; that is, they write across the back of it these words, *Pay to the order of Henry French*, sign their firm name underneath, and deliver it to him; ¹⁶French is then said to be the *indorsee* and Hunt & Helm the *indorsers*. ¹⁷Had the draft been made payable to Hunt & Helm or *bearer*, they might have transferred it without indorsement, but being payable to them *or order*, they must indorse it, though they may do so in such manner as to avoid liability in case of non-payment. French is now the holder of the bill, and may transfer it by indorsement. ¹⁸He indorses it, for example, to F. J. Griffen, and he presents it to Jones, the *drawee*, for acceptance, who writes across the face of the bill the word "accepted," adding the date and his signature. Griffen thereupon endorses and negotiates the bill. The face of this draft would then appear as in the first of the following forms, and the back showing the indorsements, as in the second:

¹⁹Form No. 2.

	<p>\$1,000.</p> <p style="text-align: right;">SPRINGFIELD, Ill., April 15, 1887.</p> <p><i>Sixty days after sight pay to Hunt & Helm or order, one thousand dollars, value accepted, and charge the same to my account.</i></p> <p style="text-align: right;">D. D. KNETTLES.</p> <p>To ELWOOD S. JONES, Chicago, Ill.</p>
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²⁰Form No. 3.

	<p style="text-align: center;">Pay to the order of Henry French. HUNT & HELM.</p> <p style="text-align: center;">Pay to F. J. Griffen or order. HENRY FRENCH.</p> <p style="text-align: center;">F. J. GRIFFEN.</p>
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It will be noticed that the first two indorsements differ somewhat in form, but the meaning is the same. Either is in effect a direction to the maker by the indorser to pay the money to the person whom he names in the indorsement, or

to any one else indicated by that person. For example, Hunt & Helm say in substance to Mr. Jones, we direct you to pay the amount named in the draft to Henry French, or to any other person to whom he may order it paid.

7. Liability of Parties. ²¹Mr. Jones, the *drawee*, by his act of acceptance, becomes the *acceptor*, and is bound absolutely to pay the amount of the bill. ²²In the first instance, a draft is a contract between the *drawer* and *payee*, by which the former agrees with the latter that the *drawee* will pay the amount called for by the draft, and in case he should refuse to do so then that he, *the drawer*, will pay it. Of course this does not appear written in the bill, but it is as absolute an agreement as though it were so written. Mr. Knettles is as firmly bound by this implied agreement as he would be by adding to the bill itself, before his signature, these words: "And in case Elwood S. Jones should refuse to accept and pay this draft then I agree to pay the same." The *drawee* is therefore not originally a party to the bill, and may not even know of its existence until it is presented to him, and hence he need not accept it unless he chooses to do so. ²³His liability begins with his acceptance. Griffen, as holder of the bill as indorsed and accepted, now has an absolute agreement by Jones, the *acceptor*, to pay one thousand dollars, and a conditional agreement on the part of Knettles, Hunt & Helm, and French, severally, that they will pay it in case the *acceptor* does not pay on presentation when the bill becomes due, provided they are duly notified of such non-payment.

8. Foreign Bills of Exchange. ²⁴A foreign bill of exchange is one that is drawn in one country upon a resident of another country. For the purpose of determining whether or not a bill is *foreign* or *inland*, the States of our Union are considered foreign countries, so that a bill drawn by a resident of one State upon a resident of another State is considered a foreign bill of exchange. The following is a usual form for a *foreign bill of exchange*:

²⁵*Form No. 4.*

<p>1. Exchange for £10,000.</p> <p><i>Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of E. A. McMath & Co., ten thousand pounds sterling, value received, and charge to my account.</i></p> <p style="text-align: right;">JOHN GRAHAM.</p> <p><i>To WILLIAM H. WALKER, London, England.</i></p>	<p>NEW YORK, May 1, 1887.</p>
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It will be noticed that this foreign bill has the same general form as the inland bill given on a preceding page. ²⁶Foreign bills, however, are usually drawn in sets of three and sent separately by different routes, or by the same route at different times. This is done to avoid the danger of loss in the course of transportation, and the one that first reaches its destination is accepted or paid, and

the others are void. ²⁷Each bill of the same set is distinguished from the others by its own number and the reference to the number of the others. The meaning of the words included in the parenthesis in the foregoing would be more apparent if written thus: (if the second and third are unpaid.) The last preceding form is the first of a set, and the following are the second and third:

Form No. 5.

<p>2. Exchange for £10,000.</p> <p><i>Sixty days after sight of this second of exchange (first and third unpaid), pay to the order of E. A. McMath & Co. ten thousand pounds sterling, value received, and charge to my account.</i></p> <p style="text-align: right;">JOHN GRAHAM.</p> <p><i>To WILLIAM H. WALKER, London, England.</i></p>	<p>NEW YORK, May 1, 1887.</p>
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Form No. 6.

<p>3. Exchange for £10,000.</p> <p><i>Sixty days after sight of this third of exchange (first and second unpaid), pay to the order of E. A. McMath & Co. ten thousand pounds sterling, value received, and charge to my account.</i></p> <p style="text-align: right;">JOHN GRAHAM.</p> <p><i>To WILLIAM H. WALKER, London, England.</i></p>	<p>NEW YORK, May 1, 1887.</p>
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9. In What Currency Payable. ²⁸A foreign bill of exchange is payable in the currency of the country in which the person resides upon whom it is drawn. Bills like the foregoing are made payable in pounds sterling because the *drawee* resides in England. Were the positions reversed, so that the drawer lived in England and the *drawee* in the United States, the bill would be made payable in dollars.

10. Method of Using the Bill of Exchange. We have seen (sec. 3) the probable origin of the bill of exchange and its crude first uses; but in both its forms, viz: *foreign* and *inland*, it has grown to be a thing of vast importance in the commercial world. Its first use was doubtless confined to merchants who were acquainted with each other's foreign transactions; but it could not thus be of very great benefit, because when A sold goods (sec. 3) in Alexandria, it would not often happen that C, his neighbor, had purchased at the same place goods of a like value; hence some medium of exchange became necessary.

²⁹This is the bank. ³⁰Referring to our forms for an illustration (sec. 8),

suppose Mr. Graham, who is a manufacturer of agricultural implements, has just shipped a cargo of reaping machines worth fifty thousand dollars to Mr. Walker of London, and he not only wants the money to use but wishes to avoid the loss of interest and the large expense of insurance in case the money was actually shipped to New York. He therefore goes to McMath & Co., bankers, with his bill of lading showing such shipment, draws his bill of exchange in triplicate, as in the forms given, and delivers it to the bankers, who pay him the money. This might be the face of the bill, or it might be more or less than the face, depending upon the *course of exchange*. If American merchants had been buying in Europe greatly in excess of European sales in this country, so that more money was needed in London, then Graham would receive more than the face of his bill—he would sell it at a premium; and some other merchant who had been buying goods in London would pay McMath & Co. an advance upon the cost to them of the draft and forward that to London in order to save shipping the money across the ocean. This arrangement of course depends upon the coming of some customer who happens to want a bill of exchange for exactly the same amount as one the banker may have purchased, which would not generally be the case. ³¹As a matter of fact, therefore, banks doing a large exchange business have branches or keep large deposits in other banks at the great trade centers. They then draw their own bills of exchange upon their foreign deposit for any amount required, and send abroad the bills they purchase, and collect them for their own accounts, thus keeping their foreign deposits good.

LESSON REVIEW.

1. How long has *negotiable paper* been known to be in use?
2. How may it be said to be a *growth*?
3. Name the usual forms of negotiable paper.
4. Which is the oldest form, and where did it originate?
5. Give an illustration of its origin and use.
6. What is a *bill of exchange*?
7. Give the distinction between *foreign* and *inland* bills.
8. What is the *inland bill* commonly called?
9. Write an inland bill of exchange.
10. Name the parties to a bill of exchange.
11. Give the names of the persons representing these parties in form No. 1.
12. What is meant by “sixty days after sight”?
13. What is a *sight draft*?
14. When are bills and notes drawn in a negotiable form?
15. How is the bill of exchange transferred?
16. Define *indorser* and *indorsee*.
17. When may a bill of exchange be transferred without indorsement and when must it be indorsed?
18. Who accepts a bill of exchange, and how is it done?
19. Add the acceptance to the bill just written.
20. Write forms of indorsement.
21. What is the acceptor’s liability?
22. Who are the original parties to a bill of exchange? What is the drawer’s agreement?
23. After acceptance, what are the liabilities of the parties?
24. What is a foreign bill of exchange?
25. Write a foreign bill.
26. Why are foreign bills drawn in sets?
27. How do the three bills in the set differ?
28. In what currency is a foreign bill payable?
29. What is the usual medium for exchanges?
30. Give an illustration showing the use of a bill of exchange.
31. How do bankers usually conduct exchanges?

LESSON XVI.

PROMISSORY NOTES.

1. Distinguished from drafts. ¹The promissory note may be said to be a very natural outgrowth from the same branch as the bill of exchange, and is very closely related to it. ²We have seen that a bill of exchange is a written order from the *drawer* to the *drawee* to pay a certain sum of money to the *payee* at a certain time. ³We have also seen that it contains an implied promise that if the *drawee* should refuse to pay as directed, then the *drawer* will himself pay to the *payee* the sum of money mentioned at the time specified. Now suppose we leave out of account entirely the *drawee* and all that pertains to him, and what will remain? ⁴Manifestly the implied promise of the drawer only. Put this in writing and we have substantially the promissory note as shown in the next form.

⁵*Form No. 7.*

	<p>\$350.</p> <p style="text-align: right;">ROCHESTER, N. Y., April 1, 1887.</p> <p style="text-align: center;"><i>One year after date, for value received, I promise to pay Fox Holden, or bearer, three hundred and fifty dollars, with interest.</i></p> <p style="text-align: right;">F. E. WADHAMS.</p>
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2. Definitions and Explanations. ⁶F. E. Wadhams is called the *maker*, and Fox Holden the *payee*. These are the original parties to a promissory note. ⁷Being delivered to the payee for a debt due, it is a written contract for the payment of money. ⁸Holden may indorse this in the manner shown in either of the first two indorsements in form No. 3, p. 66, to R. W. Daniels, to whom he thus orders it paid by the maker. ⁹By this act Holden becomes the *indorser*, that is the person who indorses, and Daniels the *indorsee*, that is the person to whom the note is indorsed. ¹⁰Or Holden may simply write his name across the back of the note, which is called indorsing it *in blank*. ¹¹By this he orders it paid to any person to whom he may deliver it. He does deliver it, we will suppose, to Daniels. ¹²In this way he is said to indorse it to Daniels, so that Holden is *indorser* and Daniels *indorsee*, as in the first case; ¹³but the indorsement being *in blank*, Daniel's name does not appear as *indorsee*, and hence he may transfer it to any other person without himself indorsing it. ¹⁴He, however, may indorse it; and we will assume that he does, and delivers it so indorsed to Wm. H. Corbin. ¹⁵Corbin, as holder, has Wadhams' absolute contract to pay the sum named in the note, with interest; and the conditional agreement of Holden and Daniels, the first and second indorsers, to pay the note, provided Wadhams does not pay it on demand, when due, and provided further that they are duly notified of such non-payment.

3. Negotiability. ¹⁶ The promissory note is not negotiable at common law, but has been made so by statute, and now possesses that quality in common with the bill of exchange, the latter having been originally the only form of negotiable paper. ¹⁷ Hence at common law only the payee could recover on the note. The indorsee could not recover on it against the maker. ¹⁸ The word *bearer*, or *order*, has the same force in a note as in a bill of exchange. It imparts to it the quality of negotiability, under the statute. ¹⁹ If the note is payable to the payee or *bearer*, it may be transferred without indorsement *by delivery* only, but if on the contrary it be written payable to the payee or *order*, then the payee must indorse it before it can be transferred by him.

4. Form. We have seen that no particular form of words was necessary in drawing a bill of exchange, provided certain *requirements* that we shall consider were present, and the same is true of a promissory note. Printed blanks, as has been said, are now almost universally used by business men, of which the following is an example, as it would appear properly filled out for use:

Form No. 8.

	<p>\$850.</p> <p style="text-align: right;">GROTON, N. Y., June 1, 1887.</p> <p style="text-align: center;"><i>Three months after date, I promise to pay to the order of M. D. L. Hayes, eight hundred and fifty dollars, at the First National Bank, Groton, N. Y. Value received.</i></p> <p style="text-align: right;">BRACKETT H. CLARK.</p>
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²⁰ This is what is commonly called a *bank note*, because the place of payment is a bank. Most business men when they sell on credit and take their customer's notes, do not intend to hold them until maturity, and then receive payment.

²¹ The money is worth more than the interest to them in their business, and so having notes thus made, they go to the bank where they do business, indorse the notes, and the bank *discounts* them; ²² that is, if the notes are made without interest, the bank deducts from the amount of the note a sum equal to the interest thereon from that date to the maturity of the note, and gives the indorsers credit on their bank account for the balance, or pays the money directly to them if they prefer it. In case the note is with interest then the bank may give the depositor credit for its full face value or some less sum as may be agreed between the parties. ²³ The note is in effect sold to the bank and is its property, and it must see to it that such note is presented for payment at the proper time and place. ²⁴ If the note be payable at any other bank, then it must be sent there and payment demanded. ²⁵ In case it is paid when due, the *payee*, who has become also an *indorser*, hears nothing more about it, otherwise he is notified of non-payment, and must then pay it himself; ²⁶ that is, in such a case he must repay to the bank the amount he received, with whatever sum was allowed to the bank by way of discount.

Notes are occasionally made by two or more persons in the following form:

²⁷ *Form No. 9.*

<p>\$1234.35.</p> <p style="text-align: right;">BUFFALO, N. Y., June 5, 1887.</p> <p><i>One year after date, for value received, we jointly and severally promise to pay to George F. Hine, or bearer, one thousand two hundred, thirty-four and $\frac{35}{100}$ dollars, with use.</i></p> <p style="text-align: right;">Q. A. MYERS. C. A. FICKE.</p>
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It will be noticed that the promise is made "jointly and severally." ²⁸ This means that both the makers are equally liable, and they are not only liable together, but each one is liable individually to the holder for the full amount, exactly the same as though he had made the note alone. The holder may sue either of them separately or both together. It is not to be understood, however, that he has a right to collect the amount more than once. ²⁹ No matter if one only of the makers pay it, the debt is satisfied, and the holder of the note has no longer any claim against the other. ³⁰ It is not necessary that the words *jointly and severally* should be used to render the makers thus liable. Where a note reads, "I promise &c." as in form No. 8, p. 71, and is signed by two or more persons, it is in effect a joint and several note, the same as the last form. ³¹ If, however, it reads "we promise &c." but omitting the words *jointly and severally*, then all the makers must be sued together.

5. ³² Bank Bills are in form and in law promissory notes. They are made payable to *bearer*, and are of course always transferred without indorsement. ³³ When a common promissory note is offered in payment of a debt or for discount, the very first inquiry is as to the financial standing of the maker, and of the indorsers, if there be indorsements, for its value depends entirely upon their ability to pay it. ³⁴ Not so, however, with bank bills since our convenient national currency came into use, because they are all secured by a deposit of government bonds in the United States Treasury. But in the days of the old state banks, every one had to scrutinize as closely the bank bills received in the course of business as he did the promissory notes offered by his customers; and to inquire as carefully concerning the financial condition of the bank issuing the bill, as he would about the responsibility of the makers of the note.

LESSON REVIEW.

1. Is the relationship between the note and bill of exchange close?
2. What is the *bill of exchange*?
3. What implied promise does it contain?
4. What will remain if you leave out of account the drawee, and all that pertains to him?
5. Write a *promissory note*.
6. Name the *original parties*.
7. Being de-

livered to the payee for a debt due, what may a promissory note be said to be?
 8. What does an indorsement mean? 9. Define *indorser* and *indorsee*.
 10. What is an indorsement in blank? 11. What does it mean? 12. Is the person to whom a note indorsed in blank is delivered, an *indorsee*?
 13. Must such an indorsee himself indorse the note in order to transfer it?
 14. May he so indorse it? 15. What are the respective agreements of the makers and indorsers?
 16. How is the promissory note made negotiable?
 17. Who alone could recover on a promissory note at *common law*? 18. What is the force of the words *bearer* or *order*? 19. In what form must the note be to permit its transfer without indorsement?
 20. What is a *bank note*?
 21. How is it usually used by business men? 22. What is meant by discounting a note?
 23. What responsibility does this place upon the bank?
 24. What must it do when the note is payable at another bank? 25. Suppose the payee who has indorsed and transferred the note to a bank hears nothing more about it, what may he conclude?
 26. In case it is not paid, what must he do?
 27. Give the form of a joint and several note? 28. What is the liability of the makers?
 29. Does the payment of such a note by one of the makers satisfy the debt?
 30. How may a note be made to bind the makers "jointly and severally" without using those words?
 31. What is the effect if the note reads "we promise to pay" &c., without using the words jointly and severally?
 32. In form what are bank bills? 33. What inquiry does a person make about the maker of a note before taking it?
 34. Why is not the same inquiry necessary in the case of bank bills?

LESSON XVII.

CHECKS.

1. Distinguished from Drafts. ¹ A check is in its general form a bill of exchange without restriction as to time of payment. and therefore payable immediately.

² *Form No. 10.*

<p>No. 352.</p> <p style="text-align: right;">ROCHESTER, N. Y., June 3, 1887.</p> <p style="text-align: center;">BANK OF MONROE</p> <p style="text-align: center;"><i>Pay to W. B. Mersereau or order, four hundred thirty-five and $\frac{25}{100}$ dollars.</i></p> <p>\$435.25.</p> <p style="text-align: right;">B. F. GROESBECK.</p>
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This is a common form for a check, and it will be seen at once, that one of the main points of difference in appearance between that and a draft or bill of

exchange, is in the nature of the drawee. ³In the check the drawee is always a bank or banker, while in the bill of exchange that is not generally the case. Another point of distinction is, that while the draft may be payable immediately, though it usually is not, the check must be always so payable. ⁴The effect of this last rule is occasionally avoided by giving *post dated* checks. ⁵A business man whose bank account is not large enough to pay some bill falling due, will sometimes as a makeshift give a pressing creditor a *post dated* check; that is, supposing it is February 5, he will make his check in the usual form, but instead of inserting the actual date, "Feb. 5," he will date it "Feb. 10," intending that by such time he will have deposited enough to his credit in the bank to make his check good. ⁶This is a valid check, but it has no life—no force, until the arrival of the day of its date, when of course it conforms to the rule and is payable immediately. ⁷Still another point of distinction is that no days of grace are allowed upon checks.

2. Definitions and Explanations. The use of checks among business men is constantly growing. In the large cities, hundreds of thousands of dollars, and in some cases millions of dollars, change hands daily by means of checks. ⁸The manufacturer, or other man of business, deposits each day in some bank—perhaps in several—his receipts. The amount is placed to the credit of his account, and he directs the bank, from time to time, by his written order or *check* to pay it out to different persons, in such amounts as he may choose. We arrive then at this definition of a check, viz.: ⁹*A check is a written order for money, drawn upon a bank or banker, and payable immediately.*

¹⁰The parties are the same as in a bill of exchange. In the form given, Groesbeck is the *drawer*, the Bank of Monroe the *drawee*, and Mersereau the *payee*. If indorsed by Mersereau he would become the *indorser*, and the person to whom he indorsed it the *indorsee*.

3. Negotiability and Transfer. ¹¹Sometimes checks are made payable to the payee or *bearer*, but it is not safe to do so unless they are to be used immediately, because if lost or stolen the finder or thief may draw the money upon them, and the drawer or holder must lose it. ¹²In the foregoing form the check is made payable to the payee or order, and as in the case of a draft or note in the same form, it must be indorsed by the payee before he can transfer it. Hence if it should be lost or stolen no one could draw the money on it without such indorsement. ¹³If this indorsement should be so cleverly forged as to deceive the bank officials, and they should pay it, the bank would lose the amount and not the drawer; and the same rule of liability applies where the signature of the drawer is a forgery, or in other words where the check itself has been forged. Like bills and notes when made payable to *bearer*, checks may be transferred without indorsement. ¹⁴Of course when so payable the payee or any subsequent holder into whose hands the check may come, can indorse it, and thereby become responsible for its payment.

¹⁵The holder of a check has no right of recovery upon it against the bank upon which it is drawn, unless it has been certified. ¹⁶The bank is under obligation to the drawer to pay his checks whenever presented, so long as the balance

to his credit upon its books is sufficient to pay them in full; but this duty toward the drawer does not give the payee any right of action against the bank in case of its refusal to pay. ¹⁷The drawer, therefore, by notice to the bank, may stop the payment of his check at any time before it is presented. This is frequently done in case a check has been lost or stolen.

¹⁸The liability of the parties without certification are the same as in the case of a bill of exchange before acceptance. The holder must look to the maker, and indorsers, if any, for payment. There is substantially the same implied agreement between the *drawer* and *payee* of a check as between the same parties to a bill of exchange, that is, that the drawer will pay in case the drawee does not.

4. Certification. A check is not commonly presented to the *drawee* except for payment. ¹⁹It sometimes happens however that the payee or person who is about to receive the check, does not know the maker or has some doubt about his soundness financially, and therefore requests that the check be *certified*. It is then taken to the bank upon which it is drawn, and the teller or other properly authorized officer *certifies* it. ²⁰This is done by writing, or more commonly printing with rubber type, the word "good" or "certified" across the face of the check with the signature of the teller or other officer underneath; and it means that the drawer has enough money in the bank to pay it. If the check shown in the last form were taken to the bank of Monroe to be certified, the teller would first ascertain whether Mr. Groesbeck's account with the bank showed a balance in his favor of at least \$435.25. In case it did, he would *certify* the check when it would appear as follows:

²¹ *Form No. 11.*

	<p>No. 352.</p> <p style="text-align: right;">ROCHESTER, N. Y., June 3, 1887.</p> <p style="text-align: center;">BANK OF MONROE</p> <p style="text-align: center;">Pay to <i>W. E. Mersereau</i> or order, four hundred thirty-five and $\frac{25}{100}$ dollars.</p> <p>\$435.25.</p> <p style="text-align: right;">B. F. GROESBECK.</p>
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The teller would then immediately make an entry of such certification in a book kept for that purpose, and would thereafter retain enough of Mr. Groesbeck's funds to pay this check whenever it should be presented for payment. ²²It is similar to the *acceptance* of a bill of exchange by the *drawee*. ²³It makes the bank the principal debtor, and immediately liable to the holder of the check; and it is equally so if it should prove that the check was a forgery, or that the drawer had no deposit at the bank. Hence, in taking a certified check, one need inquire no farther than to ascertain that the bank is sound.

5. Cashier's Check or Certificate of Deposit. ²⁴It often happens that

a person who keeps no regular account at the bank, wishes nevertheless to deposit money for safe keeping, usually for a short time. It is customary in such cases for the bank to receive the money, and give to the depositor a *certificate of deposit* or a *cashier's check*. They amount to the same thing, but differ in form.

"The certificate of deposit in terms certifies that "A. B. has deposited in this bank ——— dollars to the credit of himself, payable only to his order hereon," and is dated and signed by the cashier or teller.

"The *cashier's check* has now largely superseded the certificate of deposit. "It is simply a check in the usual form, drawn by the cashier or teller in his official capacity upon his bank for the amount deposited, and payable to the order of the depositor. Either is negotiable and transferable in the same manner as other negotiable paper, and is in effect a certified check.

LESSON REVIEW.

1. How does a check differ from a draft or bill of exchange as to time of payment?
2. Write a check.
3. How does the drawee in a check differ from the same party to a bill of exchange?
4. What is meant by a *post-dated* check?
5. Explain its use.
6. When is it payable?
7. Are checks entitled to *days of grace*?
8. Explain the method of using checks.
9. Give the definition of a check.
10. Name the parties to a check.
11. Why is it not safe to make checks payable to *bearer*?
12. When must a check be indorsed before it can be transferred?
13. Who is the loser in case the bank pays a forged check, or a lost or stolen check payable to *order*, with a forged indorsement?
14. What is the effect where the holder of a check payable to *bearer* indorses it?
15. Is the bank liable in the first instance to the holder of a check drawn upon it?
16. What is the duty of the bank toward the drawer?
17. May the drawer by notice to the bank stop payment of his check after it has been signed and delivered?
18. What is the liability of the parties to a check before certification?
19. Why is a check certified?
20. How is it certified?
21. Write a form of certification.
22. What does it resemble in the case of a bill of exchange?
23. What is the bank's liability after certifying a check?
24. When is a *cashier's check* or *certificate of deposit* used?
25. What is the general form of a *certificate of deposit*?
26. Which is now more commonly used?
27. What is it in form, and in effect?

LESSON XVIII.

1. Necessary Conditions. As we have already seen, no particular form of words is necessary in any of the kinds of negotiable paper; yet they must conform to certain *necessary conditions*, upon which their validity and negotiability depend. 'These are six in number, and may be grouped as follows:

- ²Necessary Conditions, {
1. In writing.
 2. Proper signature.
 3. Certain designation of payee.
 4. Payable in money.
 5. Payable absolutely.
 6. Negotiable in form.

2. In Writing. ³The rule is that all negotiable paper must be made in writing. We are not, however, to understand that the whole of every note, bill, or check, must be written, for reference has been repeatedly made in the preceding pages to the fact that printed blanks are now largely used in drawing the main kinds of negotiable paper. Usually the date, names of payee and drawee, amount, time and place of payment, and the signature of the maker or drawer, are written; but they might all be printed except the last and the condition of being in writing would be satisfied. ⁴The writing should of course be in ink to insure permanency; but a note, draft, or check, written with a pencil, is valid.

3. Proper Signature. All negotiable paper must be properly signed, but the manner of signing is not so essential. ⁵A person may bind himself as maker or indorser by signing his initials. Or he may even adopt, as is occasionally done, some peculiar scroll or device, bearing no resemblance to his name, and use that as his signature; and being so signed, the note or bill would be valid. ⁶When the instrument is executed by one of a firm, or by an agent, it must be so drawn or signed as to show that it is the bill or note of the firm or of the principal.

4. Certain Designation of Payee. ⁷The payee must be pointed out with certainty. This is usually done by making the bill, note, or check, payable to him by name. If one should write "Good for one hundred and twenty-six dollars on demand," and append his signature, it would not be a negotiable promissory note; neither would this form, "I. O. U., \$100;" nor this, "I promise to pay to the Estate of Moses Lyon, deceased," &c. ⁸A note is sufficiently definite when it is made payable *to the bearer* simply, or when it describes the payee.

5. Payable in Money. Bills and notes must be payable in money, otherwise they are not *negotiable* paper. ⁹They must not even be made payable in the paper currency of any particular state or country; and they must not be made payable in any other kind of property, or in labor or services. ¹⁰They are not negotiable when made for the payment of money, and for the performance of some other act. ¹¹Its character is changed and its negotiability destroyed by fastening an agreement upon a note; ¹²but it does not so change its character by naming the consideration, or by stating an independent fact, or in the case of a draft by naming the fund to which it is to be charged.

6. Payable Absolutely. ¹³Negotiable paper must be made payable absolutely. It must signify an obligation to pay without condition: there must be no uncertainty as to the amount; no contingency as to the date at which, or the event upon the happening of which it is to be paid. ¹⁴The promise of payment must be absolute as to (1) *amount*, and (2) *time*.

(1) *Amount.* It is necessary that the instrument be made for a definite sum. ¹⁶ Where a note or bill is made payable out of a particular fund, its payment is thus made dependent upon the sufficiency of the fund; that is if there be not enough money in the fund, the note will not be paid; hence there is an uncertainty that destroys its negotiability. It is a special contract and enforceable at law like any other valid contract. ¹⁶ A note, in which the promise is to pay to a certain person a specified sum of money, "and also all other sums which may be due to him," is not negotiable. ¹⁷ The amount should be written into the body of the instrument, distinctly and correctly, and in full; but a mere mistake in spelling a word will not avoid it. ¹⁸ The amount usually appears in figures also, either in the upper or lower left hand corner of a draft, note, or check. Thus repeated in figures it is often convenient in clearing up uncertainties concerning the amount, as written in the body of the instrument. ¹⁹ The figures are not necessary, but where they are used they become a part of the bill or note. ²⁰ If there be a variance between the figures and the written amount, the written words will control, unless it be proved that the true amount was expressed by the figures. ²¹ If a draft, note, or check, having the figures filled in, be properly signed and delivered, leaving the space for the written amount blank, the holder may fill in the words expressing the amount.

(2) *Time.* ²² Bills, notes, and checks, ought to be dated, but a date is not essential to the validity of any of them. ²³ If the place where, and the date when the particular instrument was made be omitted, they may be proved by parol. ²⁴ The date does not necessarily show when it was made, because it may be either *ante*-dated, that is, dated at some time earlier, or *post*-dated, that is, dated at some time later than it is actually made. When a date is used, it is a material part of the instrument. ²⁵ The time is counted from the date. In a check the date declares when it is payable, and the bank cannot safely pay it before that date.

²⁶ But the rule is different in regard to the time of payment — *the maturity* of the instrument — which must be definitely fixed. ²⁷ A promise to pay, "provided," or "when," or "on condition," a certain event takes place, or a certain act is performed, is not a promissory note. ²⁸ The exact day of payment, however, need not be absolutely stated, nor even known. ²⁹ It is sufficient if the maturity be dependent upon the happening of some event that is sure to take place, but there must be no contingency in regard to the happening of the event. ³⁰ Thus a note made payable a certain number of days after the death of the maker's father, is a negotiable, promissory note, because that event is sure to take place; but the same would not be true of a note payable at some definite time after the maker's marriage, because it is not certain that he will ever marry. ³¹ The time of payment is a matter of agreement. The law leaves the parties free to fix it as they please. It requires only that the time be fixed, so that the promisor cannot omit or delay the payment. ³² Bills drawn payable at sight, or so many days after sight, give to the payee or indorsee, a limited discretion in fixing the time of payment, but he is bound to present them to the drawee within a reasonable time. ³³ Notes payable on demand also give to the holder a similar choice in fixing the time of payment. ³⁴ As against the maker,

the owner has such time as the statute of limitations of the particular state allows—in many of them six years—within which to call for payment, but in order to charge the endorser on it, he must demand payment when due, and give him notice promptly in case of non-payment.

7. Negotiable in Form.

Bills and notes must be negotiable in form. ³⁵ Beside the five conditions already considered they must contain what are called *negotiable words*; that is, they must be made payable to the payee, “or order,” “or bearer,” or simply “the bearer.” Without any of these the instrument would not possess the quality of negotiability. ³⁶ What then is meant by the negotiability of a note, bill or check? It is this: The instrument is enforceable at law by the holder, though the person from whom he received it might not be able to collect it. ³⁷ The transfer of any other contract carries with it only the rights that the person transferring possesses; that is, if by reason of some transactions between the parties the holder would have been obliged to admit a reduction of his claim, then the person to whom he transfers it can collect no larger amount. But the transfer of negotiable paper, though it transfers the debt represented, as in the case of any other contract, yet it differs in that it carries with it rights that the person transferring did not possess. Negotiable paper is thus favored as a commercial medium. It is treated as a species of currency, and until it is due or dishonored it passes from hand to hand like money.

8. Place of Payment.

³⁸ It is not necessary, but it is convenient and quite common to specify the place of payment of a note or bill. ³⁹ When this is done the money becomes payable and the demand must be made at the place named. ⁴⁰ The drawer of a bill, or the indorser of a bill or note, cannot otherwise be charged; but neither the acceptor of a bill nor the maker of a note is discharged by an omission to present it at the place or time named. ⁴¹ He may, however, shield himself from the payment of interest after maturity, and costs, by having the money ready to be paid over at the time and place specified.

9. Value Received.

⁴² These words are usually inserted in notes and bills, but their omission does not alter the legal effect of the instrument. ⁴³ When used in a note they admit that the maker has received value from the payee, and that the indorser has the same remedy by action upon the note. ⁴⁴ These words used in a bill of exchange are capable of two interpretations, viz: (1) That the drawer has received value from the payee, or (2) that the drawee has value in his hands from the drawer.

10. Non-Negotiable Notes and Drafts.

A promissory note is not necessarily a *negotiable* instrument. ⁴⁵ It is within the statute and valid though it is not drawn in a negotiable form. It implies a consideration. If it be made in the usual form, but under seal, it becomes in effect a bond, and is not generally negotiable under the statutes.

⁴⁶ Notes payable in specific articles, or in specific funds, or in merchandise generally, are not negotiable. They are valid as contracts, and they are assignable. Being drawn for *value received*, the payee, or the party to whom they are

assigned, may recover upon them without proving the actual consideration. "A consideration must be expressed in a *chattel note*—that is, a note payable in specific personal property other than money—in order to give it validity as a specific contract.

Drafts and orders in the general form of bills of exchange, but not negotiable, are also treated as special contracts. If they express a consideration and imply an obligation to pay, the acceptor is liable. "His acceptance binds like any other form of contract.

If the payee indorse and transfer a note that is not negotiable he assumes the liability of a new maker. "The assignee of notes and drafts that are not negotiable takes them subject to all equities; that is, subject to all defenses that the maker had against the payee. In other words, the assignee has no greater rights than the payee, while, as we have seen, in the case of negotiable paper exactly the opposite is true.

LESSON REVIEW.

1. How many *necessary conditions* are there in negotiable paper?
2. What are they?
3. What is meant by saying that negotiable paper must be in writing?
4. Is negotiable paper written with a pencil valid?
5. How may a person bind himself by signing negotiable paper otherwise than by writing his name in full?
6. What must the signature show in case of partnership or agency?
7. How is the payee usually designated?
8. How may he be otherwise sufficiently designated?
9. May negotiable paper be made payable in any particular currency?
10. May it be made for the payment of money and the rendering of services?
11. What effect would either have upon the negotiability of the instrument?
12. What will not destroy its negotiability?
13. May negotiable paper be made payable conditionally?
14. In what respects must there be no uncertainty?
15. What is the effect of making a note or bill payable out of a particular fund?
16. Is a note negotiable where the promise is to pay a certain sum and also all other sums which may be due?
17. How and where should the amount be written?
18. How and where else should the amount appear?
19. What is the effect of using figures?
20. In case of variance between the figures and written words which will control?
21. What right has the holder in case the figures appear and the amount is not written?
22. Must negotiable paper be dated?
23. If omitted how may it be proved?
24. Define *ante-dated* and *post-dated*.
25. Why is the date if used material?
26. What is the rule with regard to the time of payment?
27. What promises as to time of payment will not constitute a promissory note?
28. Must the exact day of payment be stated?
29. How otherwise may it be made sufficiently certain?
30. Give illustrations showing what events are sufficient, and what are not, to fix the date of payment.
31. How is the time of payment fixed?
32. What discretion has the holder in fixing the time of payment of bills payable "at sight" or some certain number of days after sight?
33. What in case of notes payable on demand?
34. How long a time has the owner as against the maker within which to present such a note?

35. What are *negotiable words* and what is the effect of their use? 36. What is the meaning of *negotiability*? 37. Explain the difference in effect between transferring negotiable paper and any other contract. 38. Must the place of payment be specified? 39. What is the effect where it is specified? 40. Who are discharged and who are not by a failure to demand payment at the place specified? 41. How may the maker of a note or the acceptor of a bill shield himself from the payment of costs and interest after maturity? 42. Must the words *value received* be used? 43. When used in a note what do they mean? 44. What in a draft? 45. Must a note be negotiable to be valid? 46. What notes are not negotiable? 47. What is a *chattel note*? 48. What is the effect of acceptance of a non-negotiable bill of exchange? 49. What is meant by *subject to all equities*?

LESSON XIX.

INDORSEMENT AND TRANSFER.

1. Who May Transfer? ¹Only the payee of a note or bill or the party holding the title can transfer it by indorsement. ²A minor who is named as the payee in a note may transfer it by indorsement for value, ³but he cannot by that act surrender his right to avoid that, as he might any other contract, nor can he be held on his indorsement in case of non-payment of such note, ⁴though of course no other party to the paper can set up his infancy to evade liability. ⁵At common law a note or draft payable to a married woman is payable in effect to her husband, because, as we have seen, all her personal property belonged to him, ⁶but her transfer of it by indorsement was held valid, where his assent to the act could be inferred. ⁷A note made by a married woman is a nullity as against her, but that does not affect subsequent parties, who are liable on a note made or indorsed by a married woman, and afterward indorsed by them, the same as if she were competent to contract. ⁸In states where statutes have been passed contravening the common law in this respect, a married woman may of course make and indorse notes or drafts as though she were single.

⁹On the death of the payee or holder, his executor or administrator duly appointed takes title to his personal estate, and may transfer his notes or bills by indorsement or delivery; ¹⁰but he has no power to bind the estate by the usual contract of indorsement. ¹¹Unless he indorses the paper without recourse, he binds himself personally. ¹²Having thus no authority to bind the estate by indorsement, he does not change his liability by adding to his signature, *administrator*. He will be still personally liable unless he indorses without recourse. ¹³A note payable to the treasurer of a corporation by name may be transferred by his indorsement as treasurer without incurring any personal liability, because the form of the note and of the indorsement show that he is acting as an agent. In like manner where the title to the property of an insolvent has legally passed

into the hands of another person, as assignee, trustee, or receiver, he is thus authorized to transfer by indorsement any paper that may come into his possession in such representative capacity. ¹⁴ Where there are two or more payees named in a note or bill, who are not partners, they must all unite in the transfer; ¹⁵ but if the paper is payable to a firm, then any partner may indorse it in the firm name and thus transfer the title and bind his copartners.

2. The Manner of Transfer. ¹⁶ The mode in which a bill or note may be transferred is determined by its form. ¹⁷ If it is payable to A. B. or bearer, or simply to the bearer like a bank note, it may be transferred by delivery; ¹⁸ but if drawn payable to A. B. or order it is transferable only by his indorsement and delivery. ¹⁹ The transfer by delivery simply, passes the title, but it requires the indorsement to create the conditional contract to pay. ²⁰ The indorser is bound to pay the note or bill on two conditions, viz.:

(1) that it be not paid on demand at the time when and the place at which it becomes due, and

(2) that he is duly notified of such non payment.

²¹ The indorser's contract in the case of a bill of exchange involves an additional condition, viz.: that he will pay it if the drawee refuses to accept and he is duly notified of such refusal. ²² And in the case of a foreign bill this condition is extended so as to include a protest for non payment or non acceptance, and unless so protested the indorser will not be bound.

3. Methods of Indorsing. ²³ There are two principal ways of indorsing a note or bill, which are in frequent use in business transactions. ²⁴ They are as follows:

1. Indorsement in blank.
2. Indorsement in full.
3. Indorsement without recourse.

4. Indorsement in Blank. ²⁵ When the indorser writes his signature only, across the back of the note or bill, it is said to be indorsed in blank. ²⁶ After the person named as payee in the note has thus indorsed it the instrument is transferable by delivery and may thereafter be transferred any number of times without further indorsement. ²⁷ Where a note or bill is indorsed in blank, the subsequent holder may write over the signature a special indorsement making it payable to himself, ²⁸ which would transform it into an indorsement in full; ²⁹ but he cannot thus insert an indorsement that will vary the nature of the indorser's contract.

5. Indorsement in Full. ³⁰ This is an indorsement by which the indorser restricts the payment of the note or bill to some particular payee. ³¹ He does it by writing across the back of the paper "Pay to C. D. or order" or "Pay to the order of C. D." and signing his name underneath the words. ³² He thus directs the maker of the note or acceptor of the bill to pay the same only to C. D. or to such other person as C. D. may designate in writing. ³³ This is manifestly the safest indorsement, because if the paper is lost or stolen the thief or finder cannot enforce payment without the signature of C. D., and therefore this mode of

indorsement is generally adopted to guard against loss of the paper in transmission from place to place. ³⁴ If a note or bill be indorsed in full each time it can only be transferred by or through the indorsement of the indorsee. From this and the last section it appears that any subsequent holder of a bill or note indorsed in blank, no matter how many times it has been transferred, may transform such indorsement into an indorsement in full by writing the clause requiring payment to himself above the last signature. This will, of course, make his own indorsement necessary to the next transfer of the paper.

6. Indorsement without Recourse. ³⁵ As we have seen, when the payee or an indorsee writes his name across the back of a note or bill, either as an indorsement in blank or with the clause making it an indorsement in full, he thereby binds himself by the usual conditional contract of indorsement to pay, in case the parties primarily liable fail to do so, provided he is properly notified of such non payment. Now it sometimes happens that a payee or indorsee does not wish to assume that liability, and yet he must indorse the paper in order to transfer it. ³⁶ He therefore writes across the back of the bill or note the words "without recourse to me" or simply "without recourse" and places his name underneath. ³⁷ By this form, called an *indorsement without recourse*, he conveys the title but expressly refuses to become responsible. No subsequent holder can have any claim against him — any recourse to him — in case of non-payment of the bill or note. ³⁸ An indorsee may avoid personal responsibility where he is known to be acting as an agent, trustee, cashier or the like, by writing after his name the word or words showing the capacity in which he indorses. ³⁹ But he would not escape liability by adding to his signature a word like "backer" or "surety," which is consistent with his liability as an indorser.

7. Other Indorsements. ⁴⁰ The owner of a note or bill may wish for some reason to stop its further transfer and confine the payment to some particular person. In that case he writes across the back of it a *restrictive indorsement*, as follows: "Pay to E. F. only," and adds his signature. ⁴¹ Of course that suspends its negotiability, and the maker or acceptor is bound to pay that particular indorsee alone.

⁴² There are other forms of indorsement used for the purpose of collection without the intention of transferring the title. These are used extensively by banks where they send notes for collection to other banks and by persons having their bank account at some distant place. ⁴³ A man living at Rochester, N. Y., has a bank account in St. Paul, Minn.; he wishes to deposit a check to his credit but does not care to take the risk of sending it by mail indorsed in blank; and hence he writes across the back this indorsement above his signature: "Pay Germania Bank of St. Paul for my account." This enables the bank to collect the amount of the check and place it to his credit, and the depositor has had the protection of a full indorsement in sending the paper.

⁴⁴ A memorandum written on the back of a note is not treated as part of the note, but at the same time it is notice to the party taking it of the facts thus expressed.

8. Implication of the Indorsement. ⁴⁶ Good faith on the part of the indorser is implied in every case. ⁴⁷ By his contract of indorsement he, in effect, agrees with his indorsee, and in like manner with every subsequent holder, (1) that the instrument itself, including all signatures before his own, is genuine; (2) that he has a good title to the paper; (3) that he is competent to contract; (4) that the maker is also competent to bind himself by contract, and will pay on presentation when due; and (5) that if the maker does not so pay, the endorser will, upon due notice of such non-payment.

9. The Indorser's Contract. The same rule in regard to implied warranty of title applies in the transfer of negotiable paper as in the sale of any other article of personal property. ⁴⁸ By transferring it, either with or without indorsement, the holder warrants his title and the genuineness and validity of the instrument, that is, he warrants that he is the owner of the paper and that it is not forged or otherwise illegal or invalid. ⁴⁹ It does not matter how many indorsers there may be, each one enters into a separate contract not only with his immediate indorsee but with every subsequent indorsee. ⁵⁰ Such an indorsement, where it is unqualified, comprises two distinct contracts, viz: (1) the assignment and transfer, which is an *executed contract*, and (2) an *executory contract*, which is the implied agreement of the indorser to pay the note or bill, upon the usual conditions of an indorsement.

⁵¹ The instrument may be illegal as between the prior parties and yet the holder who transfers by indorsement is liable under his contract. ⁵² If he transfer it without indorsement, he is still liable under his implied warranty, in case the paper proves to be invalid or illegal. ⁵³ The indorser cannot change his liability by an oral agreement made at the same time as the indorsement.

⁵⁴ The indorser's liability differs somewhat in the different states, because it is fixed by the laws of the state where it is made, and these, as we have seen, are not always uniform. The negotiability of promissory notes, and the indorser's liability, as already set forth, is a statement of the law in force in the New England States, New York, Pennsylvania, Maryland, South Carolina, Louisiana, Tennessee, Ohio, Michigan, Mississippi, Iowa, Minnesota, California and Oregon. In some other states a note made payable at a bank is negotiable, no matter whether it conforms to the usual requirements in other respects or not. In North Carolina and Georgia the indorser of a note is held as a surety, and no demand or notice of non-payment is necessary to charge him. In Kentucky, Missouri, Indiana, Alabama and Illinois, the indorsement of a note that is not made by statute negotiable, binds the indorser to pay only on condition that the assignee uses due diligence by suit to recover from the maker, unless the maker be insolvent or a non-resident. In all the states promissory notes, whatever their form, are assignable, and the assignee may recover upon them against the prior parties.

⁵⁵ Each indorser, as we have seen, is liable under his contract to all subsequent indorsees, and hence when he takes up the note, they have no further claim against him and he may strike out all indorsements subsequent to his own.

LESSON REVIEW.

1. Who may transfer a note or bill? 2. Can a minor transfer a note or bill by indorsement? 3. Is the act binding upon him? 4. May any other party take advantage of his infancy to evade liability? 5. Under the common law to whom in effect was a note in favor of a married woman payable, and upon what theory? 6. In what case was her transfer of it by indorsement valid? 7. Does the fact that a married woman's note is a nullity affect the liability of subsequent parties? 8. Where may a married woman make and indorse drafts? 9. Who takes title to a note or bill in case of the death of the payee? 10. Has an executor or administrator power to bind the estate by an indorsement? 11. How may he avoid binding himself individually? 12. What effect does it have, if any, where he writes the word "administrator" after his name in an indorsement? 13. Why does the treasurer of a corporation incur no personal liability by indorsing a note made payable to him as treasurer? 14. How must two or more payees who are not partners transfer negotiable paper? 15. How may it be transferred when payable to a firm? 16. What determines the mode of transfer of a bill or note? 17. What form of negotiable paper is transferable by delivery? 18. What form requires indorsement? 19. What is the difference in effect between a transfer by delivery and by indorsement? 20. Give the conditions upon which the indorser is bound to pay the note or bill. 21. What additional condition does the indorser's contract involve in a bill of exchange? 22. How is this extended in case of a foreign bill? 23. How many principal ways are there of indorsing negotiable paper? 24. What are they? 25. What is an indorsement *in blank*? 26. How may a note or bill so indorsed be transferred? 27. What right has the holder of the paper in regard to an indorsement in blank? 28. What effect does it have? 29. What restrictions are there upon this right to insert a special indorsement? 30. What is the result of an indorsement in full? 31. How is such an indorsement made? 32. What direction does the indorser give the maker or acceptor by such form of indorsement? 33. Why is this the safest indorsement? 34. How does it affect the transfer of a note or bill when it is indorsed in full each time? 35. What is the indorser's liability under an indorsement *in blank* or *in full*? 36. How may the indorser avoid this liability and yet transfer the paper? 37. What is this form of indorsement called? 38. In what other cases may an indorser avoid personal responsibility? 39. Why would not "backer" or "surety" added after an indorser's name relieve him from liability? 40. Where an indorser wishes to stop the further transfer of a note, what kind of an indorsement will he use? 41. How does this bind the maker or acceptor? 42. For what purpose are other forms of indorsement used? 43. Give an illustration. 44. What is the effect of a memorandum on the back of a note? 45. What is implied by an indorsement? 46. What five agreements does the indorser in effect make with all subsequent holders? 47. What does the holder of negotiable paper warrant in transferring it? 48. Does each indorser enter into the same contract, and with whom? 49. How many distinct contracts does an unqualified indorsement comprise and what are

they? 50. Does illegality of the instrument relieve the holder who transfers it by indorsement? 51. What liability does he assume by transferring without indorsement? 52. May the indorser vary his liability by an oral agreement made at the same time? 53. Why does the indorser's liability differ in the different states? 54. When may an indorser strike out all indorsements follow his own, and why?

LESSON XX.

1. Time of Transfer. ¹The rights of a purchaser of negotiable paper depend largely upon the time when it was transferred, but this has reference in each case to a specific date, viz.: the *maturity* of the instrument. Hence, in order to determine the purchaser's rights, we must consider what they are in case the transfer is made, (1) *before maturity*, and (2) *after maturity*.

2. Before Maturity. We have seen that although a note might be invalid as between the original parties, yet the indorser who transferred it was liable on his contract. ²But we may go farther than this and say that an indorsee who thus receives a note or bill *in good faith before maturity* and *for value* may enforce payment from the maker, although the paper was not valid as between the original parties. Hence the innocent holder of a negotiable note or bill of exchange, which was properly transferred to him for value before it became due, has a good title to it and may enforce collection without any regard to the rights and equities that may have existed between the original parties. ³It follows from this therefore that a person may convey better title to negotiable paper than he himself has, which is the only exception to the general rule as it will be hereafter laid down, that only the owner of personal property can convey title to it. ⁴A person who has found, or the thief who has stolen, negotiable paper so drawn that it may be transferred by delivery, may convey such a title to an innocent purchaser for value before maturity, that he may enforce collection of the same.

⁵The usages of merchants which have come to be recognized as positive law, called the *law merchant*, have given to negotiable paper alone this peculiar advantage to facilitate its use as a commercial medium of exchange; ⁶but in order that the assignee or indorsee shall take perfect title when his assignor had none, he is held strictly to these four requirements, viz.: the instrument must have been obtained (1) in good faith, (2) for value, (3) before maturity, and (4) he must not have known of any legal or equitable defense to it; ⁷that is, he must not have been aware of any reason why the maker should not pay it precisely according to its terms, or why he could not be compelled to do so.

3. After Maturity. The case is entirely different when negotiable paper is transferred after it has become due. ⁸It may be transferred as readily and in the same manner as before maturity, but the purchaser takes it at his peril. ⁹It

is subject in his hands to any defenses that may have existed against it in the hands of the person holding it when it became due. ¹⁰ If he could not have collected it, the purchaser after maturity cannot. ¹¹ To illustrate this, suppose Nelson Stevens gave to Warren Jones his negotiable promissory note for fifty dollars, payable in sixty days, and that a month later Stevens sold and delivered to Jones farm produce of the same value, which he charged to him. When the note becomes due in the hands of Jones, he cannot compel Stevens to pay him the amount of it, because Stevens has a defense to it by way of counterclaim for the value of his produce, and if any other person takes the note after it becomes due, Stevens may interpose the same defense to it in such person's hands. ¹² When a note or bill has been indorsed and the indorser properly charged by notice of the nonpayment, he is liable to the purchaser after maturity, although such purchaser could not collect of the maker. ¹³ The fact therefore that a note or bill is past due is said to put the proposed purchaser upon inquiry. ¹⁴ It raises the presumption that it had not been paid because there was some legal objection to it.

4. Loss of Negotiable Paper. ¹⁵ We have seen that negotiable paper so drawn, that is payable to bearer, or so indorsed, that is in blank, that it is transferable by delivery, may pass into the hands of a holder in good faith and for value before maturity, who thus takes a valid title to it, notwithstanding the fact that it may have been previously lost or stolen. ¹⁶ A note, however, that is payable to some payee named, or to his order, and which has not been indorsed, or which has been especially indorsed to some other person, and afterward lost, cannot be negotiated to the prejudice of the true owner, because the finder cannot indorse it, and it cannot be transferred without the owner's indorsement.

¹⁷ The acceptor of a bill of exchange or the maker of a note transferable by delivery has a right to insist upon its surrender when he is called upon to pay it. ¹⁸ In like manner when any indorser is required to pay a note or bill that he has indorsed, he is entitled to the possession of the same so he can bring an action upon it and recover from the prior parties. ¹⁹ In most of the states there are statute laws providing for recovery by the owner upon lost negotiable paper. ²⁰ It is generally made necessary for him to give a bond to protect the maker from all claims on account of the lost paper, and he cannot recover without giving this bond. ²¹ In case there is no statute provision for such recovery in any particular state, a person suing upon lost negotiable paper must be governed by the established practice of the courts. ²² But it is not necessary that security be given unless the lost instrument is negotiable and transferable by mere delivery. ²³ Where it can be clearly shown that the instrument has been destroyed, it does not come under the rule requiring security to be given in case of lost negotiable paper, ²⁴ because being no longer in existence it cannot come into the hands of any other person.

5. Days of Grace. ²⁵ It long ago came to be a custom among merchants to allow the acceptor of a bill of exchange three days after it became due in which to make payment. ²⁶ This allowance of extra time was said to be a matter of *grace* or *favor*, and hence the time so allowed came to be called *days of grace*,

²⁷ and this custom of merchants was accepted and established by the courts as law. ²⁸ Hence, whenever *days of grace* are allowed, it is no longer a matter of favor but of right, and the maker of a note, or the acceptor of a bill, which is entitled to days of grace cannot be compelled to pay the same until the expiration of the days of grace in addition to the time for which the instrument was given. ²⁹ The effect is, therefore, that notes and bills generally are not due until the last day of grace; ³⁰ but when the last day of grace falls upon Sunday or a legal holiday, the paper becomes due on the second day of grace, and if the last two days of grace fall upon a Sunday and a legal holiday, both must be excluded. ³¹ As we have already seen, promissory notes are not negotiable at common law, like bills of exchange, but have been made so by statute, which gave to them the right to days of grace in common with the bill of exchange. ³² It follows that notes which are not negotiable are not entitled to days of grace.

³³ It is to be noted, however, that not all classes of negotiable paper are entitled to days of grace. ³⁴ Notes, bills and checks payable on demand are not allowed days of grace.

³⁵ The laws of the states are not uniform in regard to allowing days of grace on negotiable paper. In one state days of grace have been abolished by statute, and in others they have been restricted to promissory notes, or to negotiable paper discounted by a bank or left at a bank for collection. ³⁶ Hence, one must become acquainted with the law of the particular state in which he is doing business, in regard to the allowance of days of grace, before he can safely enter upon any transaction involving that question; ³⁷ and it is the law of the place where the note or bill is to be paid that controls.

6. Consideration. ³⁸ A consideration is implied in all negotiable paper, and in the hands of a holder in good faith and for value, this presumption will prevail over the fact, in case there happened to have been no consideration. ³⁹ Between the original parties, however, a consideration is just as essential as it is in any other contract. The want of it prevents a draft or note from becoming a contract between them. ⁴⁰ If a man who wishes to make his son a present, writes and gives to him his promissory note, it does not constitute a contract, and the son cannot compel his father to pay it. There is no consideration to support the note, as a promise to make a present is not binding in law. ⁴¹ Where, however, the promise or agreement is executed and the gift actually delivered, it is binding and cannot be recalled. ⁴² Hence, where a father with the intent to make his son a present gives him a check, it creates no contract between them until he draws the money upon it, and the promise becomes executed; and if the father should die before the son had actually become possessed of the gift by drawing the money, the check would be void in the son's hands for want of consideration. ⁴³ But a person who holds the promissory note of another person may indorse and deliver it as a valid gift.

7. Accommodation Paper. ⁴⁴ Suppose A. makes his promissory note payable to B. or order, for his accommodation—that is so that B. can sell the note and procure money for his own use. This is called an *accommodation note* or *accommodation paper*. ⁴⁵ In like manner if B. should draw a bill on A., who

accepts it, to enable B. to procure money upon it, such bill is called accommodation paper. ⁴⁶In either case A. loans his credit to B. as an accommodation to him. He owes B. nothing, and therefore B. cannot compel A. to pay him the amount of the note or bill; it was given without consideration. ⁴⁷But the fact that the note or bill was so given, and even the the name "Accommodation Paper," indicates that although not given for value, it was nevertheless given for use. ⁴⁸A. by making the note or accepting the bill and leaving it in the possession of B. authorizes him to negotiate it for money, pledge it as security, or apply it to the payment of his debts. ⁴⁹It is his act of transferring the paper which converts it into a contract, but he must do this before maturity.

⁵⁰A person who is thus given accommodation paper to be used for some particular purpose, has no right to divert it to some other use. ⁵¹But his position gives him the advantage, that, while he has not the legal right, he has the power to negotiate it for some different purpose, and where he thus transfers it for value before maturity, and in the regular course of business, the party taking it is treated as a holder in good faith, and where he gives value for it, and there are no circumstances from which bad faith may be attributed to him, he may recover on the paper.

8. For Value. We have repeatedly seen that one of the essentials in relieving an owner of negotiable paper from any defenses that may exist against it, is that he shall be a holder *for value*. It may then be asked, what is giving value? ⁵²It is the giving of any thing which the law regards as a valuable consideration. ⁵³Surrendering securities, or incurring some new liability on the strength of receiving the paper, would be giving value for it. ⁵⁴It is not generally held that one who takes negotiable paper as collateral, or additional security for a debt already existing, is such a holder for value, as to relieve him from the defenses that may exist against it. ⁵⁵It is so held on the ground that he parts with nothing, hence has not given value; but where he takes it as collateral security for a new advance of money, or for any new obligation incurred, he is a holder for value.

Illegality of consideration has the same effect in the case of negotiable paper in rendering it void, as between the original parties, as in other contracts. ⁵⁶But if a note that is illegal, say for usury, in the hands of the payee, is indorsed by him to an innocent holder for value, the indorsement is a new contract and will bind him.

⁵⁷Where a bill or note is declared void by statute, it cannot be enforced against the acceptor or maker, even by a holder in good faith and for value, but unless expressly so declared, illegality of consideration will be no defense against such holder. ⁵⁸The legislature may permit, or it may prohibit an action on the illegal contract in favor of an innocent third party. ⁵⁹For example, the agreement to take more than the legal rate of interest, that is a usurious agreement, is illegal; and while the laws of the state of New York declare all notes or bills of usurious origin, so absolutely void that they cannot be enforced by any one, yet in most of the states the law does not prohibit an action for the collection of the amount actually loaned, and in some cases with the addition of legal interest thereon.

⁶⁰ The purchaser of negotiable paper for value, without notice, that is without notice of any defense existing against it, is not a party to the original contract. He reaps no benefit from it, and hence is protected in his title to it, and his right to enforce payment of the same. For example, it is unlawful for one partner to make notes or accept drafts in the firm name, for his own individual benefit, or for the benefit of a friend; and yet where he does so, and the paper passes into the hands of an innocent holder, for value, the firm may be compelled to pay it.

LESSON REVIEW.

1. Upon what do the rights of a purchaser of negotiable paper largely depend, and to what date does this refer? 2. What greater right may an indorsee have than the payee? 3. What result follows that is an exception to the rule regarding sales of personal property? 4. Under what circumstances may a thief or finder of negotiable paper convey good title to it? 5. What is the *law merchant*, and for what purpose has it given this advantage to negotiable paper? 6. How many and what are the requirements upon which the assignee or indorsee may take good title where the assignor had none? 7. What is meant by the fourth requirement? 8. May negotiable paper be transferred as readily after, as before maturity? 9. In what different position does the holder stand who takes it after maturity? 10. How does this result? 11. Give an illustration. 12. Does a transfer after maturity affect the indorser's liability? 13. Should the fact that a note or bill is past due put the proposed purchaser upon inquiry? 14. Why? 15. What forms of negotiable paper may be transferred with good title notwithstanding the fact that it may have been lost or stolen? 16. What form cannot be so transferred, and why? 17. When may the acceptor of a bill, or the maker of a note, require its surrender? 18. When may an indorser require possession of the paper, and for what purpose? 19. How are provisions usually made for recovering on lost negotiable paper? 20. What must the holder usually do? 21. What course is adopted in case there is no statute upon the subject? 22. What form of negotiable paper requires the giving of security in case of loss? 23. Is security necessary in case the paper is destroyed? 24. Why? 25. What custom existed at an early time among merchants in regard to allowing additional days for the payment of a draft? 26. Why were they called *days of grace*? 27. Has this been adopted as law? 28. What has been the result? 29. What has been the effect in fixing the time when bills and notes become due? 30. What exception is there to the rule? 31. How did negotiable promissory notes become entitled to days of grace? 32. What notes are not entitled to days of grace? 33. Are all classes of negotiable paper entitled to days of grace? 34. Name exceptions. 35. Are the laws of the States uniform upon this subject? 36. What precaution must therefore be taken? 37. What law controls in regard to allowing days of grace? 38. How far does the presumption of a consideration in negotiable paper extend? 39. Between what parties is a consideration necessary, and what is the result in case there is none? 40. Give

an illustration. 41. When is a promise, or agreement, without consideration, binding? 42. Give an illustration. 43. Does the indorsement and delivery of the note of a third person, constitute a valid gift? 44. Illustrate what is meant by an *accommodation note*. 45. Also an *accommodation bill*. 46. What is the real result of the transaction? 47. What does the name indicate? 48. What use of the paper does the accommodation maker, or acceptor, authorize? 49. What converts accommodation paper into a contract, and when must it be done? 50. How is the right of the person for whom the accommodation paper is made or accepted, restricted? 51. What advantage does his position give him in exceeding this right? 52. What is giving value? 53. Give illustrations. 54. Does taking the paper as collateral security for an existing debt constitute such a giving of value as to relieve the holder from all defenses? 55. Upon what grounds is it so held? 56. May the innocent holder for value, hold the indorser on an illegal note? 57. What is the effect where a bill or note is declared void by statute? 58. What power has the legislature in regard to actions on illegal contracts? 59. How is this illustrated in relation to usurious contracts? 60. On what ground is the innocent purchaser of negotiable paper protected in his title to it?

LESSON XXI.

1. The Drawer's Contract. ¹The drawer of a bill contracts with the payee, to whom he delivers it, and with every other person to whom it may be afterwards transferred, (1) that the drawee is capable of accepting it; (2) that he shall accept the same unconditionally when presented for that purpose; (3) that he shall pay it on demand when it becomes due; and (4) that if the drawee fail to accept, or to pay, the drawer will himself pay the bill, with damages, provided only he is notified. ²As has already appeared, the theory upon which the bill of exchange proceeds, is that the drawee has money in his hands belonging to the drawer, who by that means orders him to pay it to some third person. ³It follows, therefore, that his position is similar to that of an indorser of a note, and hence that if the drawee should for any reason decline to accept or pay the bill, the drawer ought to be notified of such refusal. ⁴On this theory, then, it is understood that in every bill of exchange there is an implied agreement for notice to the drawer of non-acceptance or non-payment. ⁵The drawee's refusal to accept, or to pay the bill when due, after acceptance, gives the holder an immediate right of action against the drawer, provided due notice is given him of such refusal.

⁶When a bill is addressed to the drawee at a particular place, this also constitutes a part of the drawer's contract; that is, the payee or other holder is thus given the right to expect to find the drawee at such place.

⁷As the drawer's contract contemplates an unconditional acceptance of the bill, the holder cannot safely permit any other. ⁸By taking a qualified acceptance, as for example, one changing the place of payment of the bill, the holder in effect enters into a new and different contract with the drawee, and hence releases the drawer, that is waives his right under the drawer's contract, of calling upon him to pay in case of non-payment by the drawee.

2. Presentation for Acceptance, When? ⁹In case a bill is drawn payable a certain time after date, or on a particular day, the holder need not present it until maturity and then for payment. ¹⁰But when it is drawn payable at sight, or so many days or months after sight, it must be presented for acceptance in order to fix the date when it will become payable, and the law requires that it be thus presented within a reasonable time. ¹¹What is a *reasonable time* in any given case depends upon the circumstances. ¹²If a bill is drawn upon the resident of a distant foreign city the law will allow a reasonable time for its transmission to such city, and if in the course of transmission it should be negotiated from place to place through the hands of several holders, the time which would be considered *reasonable* would be longer than in the former case.

The law is the same in the case of an inland bill of exchange, drawn payable at sight, or after sight. The holder must present it for acceptance within a reasonable time, and the *reasonableness* of the time will be in like manner determined by the circumstances.

¹³It has been remarked that a check is always payable on demand, and the date indicates when the demand may be made; that is, it is payable on the day of its date. ¹⁴Checks are properly dated on the day when they are drawn, but we have seen how in some cases they are dated at a future day, when, if the payee receives it, he must wait until the day of its date arrives before he can lawfully make his demand for payment. ¹⁵Where the drawer and payee or holder reside in the same place a check should be presented for payment as soon as the following day after it is received. ¹⁶If the holder deposits the check in his bank it is duly presented on the succeeding day. ¹⁷The time is extended where it is negotiated from place to place, as in case of a foreign bill of exchange. ¹⁸A check drawn on a bank in another State is in effect a foreign bill.

¹⁹Neither a foreign nor an inland bill of exchange should be long retained by the holder. It is his duty to send it forward for acceptance.

²⁰The holder of a bill must present it for acceptance within proper business hours, and these are usually held to extend into the evening at bedtime.

3. Presentation for Acceptance, Where? ²¹If a bill is addressed to the drawee at some *particular place*, that indicates where the holder should present it for acceptance. ²²In case it should prove that he has removed to another street, or a different location in the same city, it appears that the holder should with diligence seek him out and present the bill to him for his acceptance; ²³and this is true even though it prove that he has removed to some other place within the State, for the holder must then follow him with the bill and present or have it presented for acceptance. ²⁴When the bill is not addressed to the

drawee at any particular place it should be presented for acceptance at his place of residence.

4. Other Incidents of Acceptance. ²⁶The bill should be presented by the holder or his agent to the drawee himself or his duly authorized agent. ²⁶If it is drawn upon a firm it may be presented to any one of the partners for acceptance.

²⁷In the usual course of business nearly all bills of exchange are deposited with banks for collection. ²⁸When thus received the bank is bound to use diligence in presenting them for acceptance and in taking the proper steps in case of non-acceptance to charge the drawer and indorsers. ²⁹For any neglect in this regard the bank is responsible, and it is responsible for the neglect of its agent, including a foreign agent, in presenting the bill.

5. Acceptance of Bills. ³⁰Although three parties are mentioned in a bill of exchange, but two of them, viz: the drawer and payee, are what are termed *original parties*. The drawee very frequently does not know of the existence of the bill for some time after it is drawn. He has not, therefore, consented to it, and is not bound by it, nor is he a party to it. ³¹He only becomes an actual party to the bill by accepting it. By this act the drawee undertakes unconditionally to pay the bill to the holder when it becomes due. ³²He thus becomes not only a party to the bill, but the principal debtor, and the drawer and indorsers are thereafter liable as sureties for the payment of the bill upon his default. ³³The parties after acceptance occupy substantially the same position as though the drawee had made his promissory note, which the drawer and indorsers had afterwards indorsed.

³⁴It sometimes happens that a person who is about to be drawn upon or has already been drawn upon, but to whom the bill has not been presented, makes an unconditional written promise, in which the bill is clearly described, to accept it when presented. ³⁵This is held under our laws to amount to a virtual acceptance of it in favor of the party taking the bill on the faith of such promise. ³⁶This is called a *collateral acceptance*. ³⁷It is employed generally in what is termed a *letter of credit*, which is a written direction by some well-known banker authorizing the party to whom it is addressed to draw upon him in a particular manner for any amount he chooses up to a specified limit. These *letters of credit* are chiefly used by persons traveling in foreign countries.

³⁸A *qualified acceptance* is one in which the drawee accepts upon conditions, such as that the draft shall be paid at some different time or place. ³⁹This he may do in case the holder is willing to receive such an acceptance, and it will be enforced according to its terms. ⁴⁰But, as has already been shown, the holder by permitting such an acceptance releases the drawer from the obligation of his contract, and he could not afterwards be compelled to pay the bill upon its non-payment by the acceptor.

⁴¹When a bill is presented for acceptance the drawee is bound to accept or return it within twenty-four hours. ⁴²If he fails or refuses to return it, or if he should destroy it, he is held liable the same as though he had accepted.

There are in some of the States special statutes governing the acceptance of

bills of exchange; and of course where such laws exist they must always be complied with, as they supersede the common law.

6. Proceedings on Non Acceptance. ⁴³Where the drawee refuses to accept an indorsed bill upon its presentation for that purpose by the holder, a notice of such refusal must be promptly given to the drawer and indorsers otherwise they cannot, generally, be held liable under their contract. ⁴⁴The presumption being that the drawee has money in his hands belonging to the drawer, the latter and the indorsers who are made immediately liable to pay the bill by such refusal to accept should have immediate notice of such non acceptance, to enable them to make preparations to meet the bill, and to secure themselves against the drawee. This is the reason for the rule requiring such notice. ⁴⁵Such being the case, the rule does not apply where the reason does not exist, and hence, it is held that where the drawer or indorser has taken a complete and perfect security against his liability, the want of notice will not discharge him. ⁴⁶Or, if it be shown that the drawer had no funds in the hands of the drawee, and was aware of that fact when he drew the bill, no injury could result to him from want of notice of non acceptance, and he will not therefore be discharged by failure of the holder to serve such notice upon him. ⁴⁷Although a bill drawn payable a certain time after date need not be presented for acceptance, yet when it is thus presented and *dishonored*, that is, the usual acceptance is refused, the usual notice must be given. ⁴⁸Where a *foreign bill* is refused acceptance by the drawee, it must be *protested* by a notary public and notice of the protest sent to the drawer and indorsers, the same as where a note or bill is protested for non payment. ⁴⁹Inland bills may also be protested for non acceptance, but this is not required by law.

LESSON REVIEW.

1. State the drawer's contract by its four divisions.
2. Upon what theory does the bill of exchange proceed?
3. Why should he be notified of its non acceptance?
4. What implied agreement is there in every bill of exchange?
5. What right does the drawee's refusal to accept, give the holder?
6. Does the address of a bill constitute a part of the drawer's contract?
7. What acceptance must the holder require?
8. What would be the effect of his consenting to a qualified acceptance?
9. What bills need not be presented for acceptance until they become due?
10. Why must a sight draft be presented for acceptance, and when?
11. Upon what does the reasonableness of the time depend?
12. Give illustrations.
13. What indicates when a check is payable?
14. Where are checks properly dated?
15. Where the holder resides in the same place as the drawer, when should he present the check for payment?
16. When is a check presented in case it is deposited in a bank?
17. What extends the time of presentment?
18. What is a check drawn upon a bank in another state?
19. What is the holder's duty with regard to bills of exchange?
20. Within what hours must the holder of a bill present it for acceptance, and what part of the day do they include?
21. Where the bill is addressed to the drawee at some particular place, what is indicated with regard

to its presentment for acceptance? 22. What is the holder's duty in case the drawee has removed to a different location in the same city? 23. What is it in case he has removed to some other place in the State? 24. When the bill is not addressed to the drawee at any particular place, where must it be presented for acceptance? 25. By whom should the bill be presented, and to whom? 26. To whom may it be presented in case it is drawn upon a firm? 27. What is the usual course adopted in collecting bills of exchange? 28. What is the bank's duty in such cases? 29. How far is the bank responsible for neglect? 30. Name the original parties to a bill of exchange. 31. When does the drawee become a party? 32. What position does he then occupy among the parties? 33. Illustrate their relative positions by a comparison. 34. What agreement does the drawee sometimes make in advance? 35. What does the law hold it to be? 36. What is it called? 37. How is it generally employed? 38. What is a *qualified acceptance*? 39. When may the drawee use such acceptance? 40. What is its effect upon the drawer's liability? 41. What is the drawee's duty when a bill is presented for acceptance? 42. What result follows his failure to return the bill or his destruction of it? 43. What must be done in case the drawee of an inland bill refuses to accept it? 44. Why should they be notified? 45. When is such notice not required? 46. Give another instance in which it is not required. 47. When is a bill *dishonored*, and what is necessary in all such cases? 48. What must be done in case the drawee refuses to accept a foreign bill of exchange? 49. How does this apply to inland bills?

LESSON XXII.

1. ¹ **Presentment for Payment**, or as it is often called, *demand*, is necessary in order to charge the drawer or indorser of a bill or the indorser of a note. ² They are *conditionally* liable, that is, they are liable on condition that the parties primarily liable refuse to pay, and that they are duly notified of such refusal. Hence, in order to fix this liability, payment must be first demanded of the maker of the note or acceptor of the bill who is unconditionally liable in the first instance. ³ The demand and notice of non-payment are conditions precedent to their liability, though there are some exceptions to this rule. ⁴ The holder must use diligence in trying to find the maker or acceptor, and demanding payment. He is not obliged to find an absconding maker.

⁵ The holder is not bound to follow the maker or acceptor into another State or country in order to demand payment. ⁶ He may make the demand at his last place of residence or business. ⁷ If, however, the maker or acceptor lived in some other State or country when the note was made or the bill accepted, then the paper must be duly presented at such place for payment.

⁸ The death or insolvency of the maker or acceptor does not relieve the holder

from the necessity of making the demand. ⁹In case of the death of either, the bill or note should be presented to the legal representatives, unless it is payable at some specified place, when it may be there presented for payment. ¹⁰If the note or bill falls due after the death of the maker or acceptor, and before any legal representatives, that is, executors or administrators, have been appointed, demand may be made at his late residence. ¹¹If the house be closed the paper may be treated as dishonored, and the usual notice of non payment given.

¹²A delay in making the demand of payment may be excused where it has been caused by a mistake in the post office, by superior force, or contagious disease which render it either physically or morally impossible for the holder to make such demand.

¹³Where one draws a bill without funds in the hands of the drawee or any reasonable ground to expect that he will have any, or that his bill will be honored, he will not be discharged by a failure to present the bill for payment.

2. By Whom. ¹⁴A bill or note ought to be presented for payment by the party entitled to receive payment. In other words, it should be presented by the holder or his agent.

3. Where and to Whom. ¹⁵When the place of payment is named in the note or bill, it must be presented at that place for payment. If it is not made payable at any particular place, then demand should be made at the residence or place of business of the maker or acceptor. If it is made payable at a bank the demand must be there made.

¹⁶In general the demand must be made upon the maker or acceptor or his duly authorized agent. ¹⁷Where there are two or more makers or acceptors who are not partners, demand must be made upon each of them.

4. Manner of Presentment. ¹⁸No formalities are required for demand. ¹⁹As a matter of fact nearly all negotiable paper requiring notice of non-payment is made payable at a bank, where it is left on or before maturity. If it is not paid before the close of banking hours on the last day allowed by law, it is considered dishonored without any more *formal* demand than holding it in readiness for payment, and notice of non-payment is accordingly given. ²⁰But the rule is that there must be an *actual* demand, and the presentment ought to be at a reasonable time and in a proper place. ²¹The street is not a proper place if the maker or acceptor objects to it.

²²When a bill or note has been lost, demand may be made by a copy with an offer of indemnity. ²³In some states custom permits demand of payment to be made without actually presenting the paper, where it is a note or inland bill.

5. Time of Presentment for Payment. ²⁴In order to charge the indorser, notes payable on demand must be presented for payment within a reasonable time. ²⁵The common law does not determine the exact measure of this "reasonable time," but it is held, as in acceptance, that the circumstances of each particular case must determine this. ²⁶It follows therefore that if transferred after such reasonable time, the purchaser takes the paper subject to all

defenses, the same as where notes or bills payable at a definite date are transferred after maturity.

²⁷ In computing the time when bills or notes payable so many days or months or years after date will become due, the day of the date is excluded and the day of payment is included. ²⁸ For example, a note dated December fifth, payable ten days after date, will be due—without days of grace—on the fifteenth of the same month. ²⁹ No attention is paid to the length of the month in making these computations. ³⁰ A note dated September tenth, payable one month after date would be due, including the three days grace, on the thirteenth of the succeeding month, and so would it if dated October tenth, although in the former case the note would have run for thirty-three days and in the latter thirty-four days; and a note dated January thirtieth or thirty-first payable one month after date would be due—without days of grace—on the last day of February.

³¹ The three days of grace allowed on bills and notes, are added to the time allowed by the instrument itself for payment, and they remain negotiable during those days, with all the protection against defenses that is allowed in the transfer of negotiable paper before maturity.

6. Payment, By Whom Made. ³² When any party primarily liable upon negotiable paper, pays it, all who are conditionally liable are discharged. In other words when the maker of a note or check pays it, the liability of the indorsers ends; when the acceptor of a bill pays it, the drawer and indorsers are discharged. This proposition is true so far as obligations under the paper are concerned, but needs qualifying in relation to liabilities sometimes arising out of the transaction. ³³ If the drawee of a bill has accepted it for the accommodation of the drawer, and afterwards has to pay it, he may sue and recover the amount paid for the drawer. ³⁴ He does not however recover on the bill, but having paid the money for the benefit of the drawer, that is, in effect, loaned it to him to pay his debts, he recovers upon the implied agreement to repay it. ³⁵ In the same way the accommodation maker or indorser of a note who has had to pay it, recovers from the party for whose benefit it was made.

³⁶ When an indorser of negotiable paper in the usual course of business takes it up, it is paid as to all subsequent indorsers; but it is good in his hands as against all prior parties, and he may enforce payment from them. ³⁷ When a stranger, that is, a person not a party to the paper, pays and takes up a note or bill after maturity, it is a question of fact whether he purchases and holds the paper as a claim against the parties to it; or whether he really pays and extinguishes it, and thus releases them.

7. To Whom Made. ³⁸ Payment must be made to the holder having title. ³⁹ The maker of a note or acceptor of a bill cannot safely make payment to a person who has not the paper in his possession. ⁴⁰ Where, however, the note is made payable to bearer, or has been indorsed in blank, the maker acting honestly may safely make payment to the party having the paper in his possession without inquiry as to his title to it. ⁴¹ It will not ordinarily avail the maker or acceptor as a discharge of his liability where he pays a holder in possession, whose claim to title rests upon a forgery. ⁴² But where he pays the holder under such

circumstances, he has a right to recover the money on the ground that it was paid under a mistake of fact.

⁴³The drawee is presumed to know the signature of the drawer, and where he has accepted and paid a bill he cannot recover the money on the ground that the signature was forged. ⁴⁴This presumption does not extend to the handwriting of the body of the instrument, ⁴⁵and hence where that has been altered from a smaller to a larger sum, he may recover back the money paid. ⁴⁶A bank also is presumed to know the signature of its depositor, and therefore if it pays a check forged in his name it cannot charge him with the amount so paid. ⁴⁷If, however, the check bears his own signature, but is so carelessly drawn that it gives opportunity to alter the sum for which it was given to a larger one, which is done and the bank pays it, the amount so paid may be charged by the bank to the depositor.

8. Time of Payment. ⁴⁸A bill or note should be paid when it is due, and it ought not to be paid until that time. ⁴⁹It certainly should not be paid before maturity unless it be surrendered and cancelled. ⁵⁰The reason of this is that it might otherwise come into the hands of an innocent holder for value before maturity and after it was paid, when the maker or acceptor would be obliged to pay it again. ⁵¹The paper should be paid upon demand when due, and during business hours, although the maker or acceptor has the whole day in which to make payment.

9. How Made. ⁵²Payment must always be made in money, unless the holder consents to accept some other kind of property. ⁵³In the ordinary course of business, however, checks are largely used in paying all obligations, including bills and notes, ⁵⁴but the holder runs a risk in accepting a check and surrendering the bill or note, because the check may be dishonored. ⁵⁵It is not paid by the check itself unless the parties so agree, which is unusual; but the party receiving it must use diligence in presenting and receiving the money on it, for if his delay causes injury to the drawer or indorsers, it will be held that the bill or note was paid and satisfied by the check.

10. Release of Principal Debtor. The maker of a note, or the acceptor of a bill is primarily liable to pay the debt—he is the principal debtor. ⁵⁶When he fails to pay it at maturity and the necessary notice is given, the drawer of the bill and the indorsers of the note or bill are bound to pay and take up the paper. It is not only his duty but a right which he may insist upon. ⁵⁷If, therefore, the holder makes a valid contract with the maker or acceptor, extending the time of payment, it deprives the drawer or indorser of this right, and releases him from liability. ⁵⁸In the same way giving time to the drawer or first indorser, will discharge all subsequent indorsers. ⁵⁹If the holder releases the maker or acceptor, all the other parties are thereby relieved from liability.

LESSON REVIEW.

1. What is *presentment for payment* called, and why is it necessary?
2. In what manner are the drawer or indorser of a bill, and the indorsers of a note

liable? 3. What relation do *demand* and *notice* bear to their liability? 4. What is the holder's duty in seeking the maker, or acceptor? 5. Must he follow him into another state? 6. Where may he make the demand in that case? 7. When must demand be made upon a maker or acceptor without the state? 8. Does the death or insolvency of either relieve the holder of the necessity of making a demand? 9. In case of death to whom should the demand be made? 10. When should demand be made at the late residence of the deceased maker or acceptor? 11. What will be the result if the house is closed? 12. When may a delay in making the demand be excused? 13. When will the drawer not be discharged by a failure to present the bill for payment? 14. Who should present a bill or note for payment? 15. Where should the demand be made under the different circumstances mentioned in the text? 16. Upon whom should the demand be made? 17. In case there are several acceptors or makers who are not partners? 18. Must the *demand* be formally made? 19. What is the usual course pursued with paper requiring notice of non-payment? 20. Must there be an actual demand? 21. Is the street a proper place for a demand? 22. How may demand be made in case the paper has been lost? 23. How does custom in some states vary the general rule in regard to demand? 24. When must notes payable on demand be presented? 25. How is the reasonableness of the time determined? 26. What is the result if the paper is transferred after a reasonable time? 27. How are the first and last days treated in computing the time when negotiable paper will become due? 28. Give an illustration. 29. Is the length of the month considered? 30. Give illustrations. 31. What is the effect of adding the three days of grace? 32. What is the effect upon all the other parties to negotiable paper when it is paid by the party primarily liable? 33. What right has the acceptor of an accommodation bill against the drawer? 34. Upon what grounds does he recover? 35. Does the same rule apply in favor of the accommodation maker of a note? 36. What is the effect upon the liability of the other parties when an indorser of business paper takes it up? 37. What is the result when a stranger pays a bill after maturity? 38. To whom in general must payment be made? 39. Is it safe to pay one who has not the paper in his possession? 40. In what case may payment be safely made to one in possession? 41. Will payment to one claiming title under a forgery discharge the maker or acceptor? 42. What right has he in case such payment is made? 43. What liability grows out of the presumption that the drawee knows the drawer's signature? 44. Does the same presumption extend to the writing in the body of the instrument? 45. What protection does this give the drawer? 46. How does this rule of presumption apply to banks, and what is the result? 47. When is a bank relieved from liability in paying a check in which the amount has been raised? 48. When ought a bill or note to be paid? 49. If paid before maturity, what precaution should be taken? 50. Why? 51. At what time in the day should it be paid? 52. In what must payment be made? 53. How is payment in fact usually made? 54. What objection is there to receiving checks? 55. Under what circumstances may it amount to payment? 56. What right does the principal debtor's failure to

pay give indorsers? 57. What is the result of the holder's extending time of payment? 58. What of his releasing the drawer or first indorser? 59. What of his releasing the principal debtor?

LESSON XXIII.

1. Proceedings on Non-payment. ¹We have already seen that the drawer and indorsers of a bill of exchange and the indorsers of a promissory note are liable to pay the same, on condition that they are duly notified of the failure of the acceptor or maker to pay the paper at maturity. It therefore becomes necessary upon the non-payment of a bill or note to take measures to fulfill this condition, and thus fix the liability of these parties. ²To that end, after the demand of payment has been made, two further steps are taken, viz.: (1) *protest* and (2) *notice of non-payment*.

2. (1) Protest. ³This is a formal declaration in writing by a Notary Public of the demand and refusal to pay. ⁴It must identify the note or bill by including a copy of it or referring to the original which has been attached. The latter is the usual way. ⁵Making the protest is an official act, and unless the statute authorizes the appointment of a deputy, which it does in some states, ⁶it must be done personally by the Notary. The following is a form of protest to be used in case of non-payment of the bill on page 65, form 1:

Form No. 12.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

I, Myron T. Bly, one of the Notaries Public in and for the county aforesaid, Do HEREBY CERTIFY, that on the 27th day of June, in the year of our Lord one thousand eight hundred and eighty-seven, at the request of the Chicago National Bank, I did present the original bill, which is hereunto annexed, at Chicago, Ill., and demanded payment of the acceptor thereof, which was refused.

WHEREUPON, I, the said Notary, did PROTEST, and by these Presents do publicly and solemnly Protest, as well against the drawer and indorsers of the said bill as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest, already incurred or to be thereafter incurred, for want of payment of the said bill.

AND I DO FURTHER CERTIFY, that on the same day and year above written, due notice of the foregoing Protest (by notice partly printed and partly written, signed by me) was given to the drawer and the several indorsers thereon by depositing notices at the post office at Chicago, Ill., postage paid, directed as follows:

D. D. Knettlies, Springfield, Ill.
Hunt & Helm, Harvard, Ill.
Henry French, Milwaukee, Wis.
Felix J. Griffen, Hyde Park, Ill.

Each of the above named places being the reputed place of residence of the persons to whom the notice was directed, and the Post Office nearest thereto.

THUS DONE AND PROTESTED, at the city of Chicago, Ill., the day and year first above written.

[L. s.] IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal of office.

MYRON T. BLY, *Notary Public*.

3. Incidents of the Protest. ⁷ The demand of payment must be made on the day when the note or bill is payable. ⁸ The protest of course immediately follows the refusal of payment, and hence the formal certificate of such protest should be dated on that day, or otherwise show that the protest was then actually made. ⁹ The writing itself may be and often is made at some subsequent time.

¹⁰ The Notary Public is an officer known to the common law and is recognized by the law of nations. ¹¹ His certificate of protest under his official seal is accepted in other cities and foreign countries as sufficient evidence of the dishonor of a foreign bill. ¹² Although the protesting of bills and notes is almost universally done by Notaries Public, it may be done by other persons. ¹³ In case there is no notary at the place where the paper is dishonored, any substantial resident of the place may protest it in the presence of two or more witnesses.

4. When Necessary. ¹⁴ A foreign bill must be protested for non-payment, unless it has already been protested for non-acceptance.

5. When not Necessary. ¹⁵ Inland bills of exchange and promissory notes need not be protested. ¹⁶ The statutes of most states, however, make provision for protesting them, and it is customary to do so, especially when they are left at a bank for payment. ¹⁷ Of course only notes that have been indorsed are protested.

6. (2) Notice of Non-payment. ¹⁸ Unlike the protest, the notice of non-payment is *necessary* in the case of the dishonor of inland bills and notes. It must be given whether there has been a protest or not.

¹⁹ The notice need not be given in any particular form. ²⁰ It need not even be in writing, although it is customary to have it written or printed. It may be given orally to the parties. ²¹ It must be sufficiently definite to identify the bill or note and distinguish it from all others. ²² Simple notice of non-payment is not sufficient. ²³ It must also show that the note or bill was not paid on demand when due. ²⁴ A notice, however, that the paper "has been protested for non-payment" has been held sufficient, because the term *protested* implies the demand and refusal of payment. ²⁵ The notice need not give the name of the holder; and it need not state, though it usually does, that he looks to the endorser for payment. The following notice would be proper in case of the bill referred to in the last form:

Form No. 13.

CHICAGO, ILL., June 27, 1887.

TO MESSRS. HUNT & HELM:

Please take notice:

That a certain bill of D. D. Knettle's for one thousand dollars, payable sixty days after sight, dated April 15, 1887, drawn on and accepted by Elwood S. Jones, and indorsed by you, was this day protested for non-payment, and that the holder looks to you for the payment thereof, payment having been demanded and refused.

MYRON T. BLY, *Notary Public*,
At CHICAGO NATIONAL BANK.

It is desirable that you notify your prior indorser, if any.

²⁶ The same notice should be addressed and sent to each indorser, and substantially the same to the drawer, although in his case the wording is modified to describe him properly.

By changing the foregoing notice so as to describe a *note* instead of a *bill*, it would be with the necessary changes of names and date adopted for use in the case of dishonored notes.

7. Service of the Notice. ²⁷ The holder is not bound to give notice to any party on the bill or note except his immediate indorser, that is, the person who indorsed it over to him. ²⁸ This and every other indorser would then be obliged to give the notice to his immediate indorser, or lose his right to enforce payment against him. ²⁹ It is safest, however, for the holder to notify all the parties, and it is customary for him to do so. ³⁰ The notice may be served through the post office where the party to be charged resides in some other town or city. ³¹ When the parties reside in the same place, the general rule is that the notice must be served personally, ³² but this has been changed by statute in some states so it may even then be served by mail.

³³ In most of the states the service may be made by the Notary, and his certificate is made evidence of such service, unless in an action the fact is directly contradicted by the pleadings. ³⁴ When served by mail, the notice must be properly addressed to the framer or indorser at his place of residence or business, with the postage prepaid. ³⁵ The service is complete as soon as the notice is mailed, no matter whether it is ever received or not.

³⁶ Where the holder does not know the place of residence or business of the drawer or indorser, and cannot ascertain it by diligent inquiry, such diligence is considered equivalent to notice. The diligence of the Notary will not always be deemed sufficient, and it certainly will not where the holder himself knew the residence of the other parties.

8. Time of Service. Notice must not, of course, be served before the demand and refusal. The drawer or indorser must be duly notified. ³⁷ He is duly notified when the notice is given to him on the same day the demand is made, or on the following day. ³⁸ The rule is that where the parties reside in the same place, the holder has one business day after demand and refusal, within which to give the notice. ³⁹ Where the notice is to be served by mail, it must be deposited in the post office in time to be taken by the mail leaving on the day after the refusal of payment. ⁴⁰ It need not go by the first mail, and if there are several mails leaving that day, the latest one will fulfill the requirement. ⁴¹ If the notice is given from party to party, each has one day in which to notify the prior indorser.

⁴² Delay in giving notice will be excused when the time is diligently used in ascertaining the residence of the drawer or indorser, or where the holder's religion forbids him from attending to secular business on some particular days. It will also be excused where a war, or sudden sickness, or other inevitable accident or providential interposition prevents giving the notice.

9. Other Incidents of the Notice. ⁴³ Any one who is a party to the paper; any one having an interest in it as collateral security, or who might take it up and sue on it, may give the notice, but a stranger cannot. ⁴⁴ As we have seen, the holder need only give the notice to his immediate indorser, though it

is customary for him to notify all the parties, and when he does so, the notice will charge every indorser on the paper in favor of all subsequent indorsers. That is, the conditional liability of all the indorsers is fixed, so that any one of them taking up the note may proceed at once to enforce payment from the prior indorsers.

⁴⁵A person through whose hands the paper has passed without indorsement, need not be notified of non-payment, and the same is true of one who has guaranteed its payment.

⁴⁶The indorsers of notes and bills not negotiable are generally liable without notice, though in some states a notice is required.

⁴⁷Notice is not necessary in order to charge the drawer or indorser for whose accommodation the bill or note has been made or accepted. ⁴⁸Nor is it required where the drawer or indorser has taken sufficient security from the maker or acceptor to pay the bill.

10. Waiver of Notice. ⁴⁹While it is true that a failure to give notice of dishonor to the drawer or indorser will ordinarily discharge him from liability, the right to such notice is one he may waive. It is frequently done in the course of business dealings, and it is customary for some men where they are discounting paper upon which they are the only indorsers, to waive notice of demand and nonpayment. ⁵⁰This is usually done by writing across the back of the bill or note, and signing an agreement of this kind, viz: "For value received, I hereby waive demand, protest, and notice of non-payment." No particular form of words is required, and the waiver is, in fact, written in various ways. But it must show that it was intended to include and waive all the steps necessary to charge an indorser.

LESSON REVIEW.

1. Why is it necessary to take any proceedings upon nonpayment of bills and notes? 2. What steps are taken after demand? 3. What is a *protest*? 4. How must it identify the paper? 5. Is it an official act? 6. What follows in regard to the notary's duty? 7. When must the demand be made? 8. What should the certificate of protest show? 9. Need it be actually written out at that date? 10. How is the Notary Public known and recognized? 11. How is his certificate of protest received? 12. Must bills and notes be protested by a notary? 13. How otherwise may it be done? 14. When is a protest for nonpayment necessary? 15. In what cases is it not necessary? 16. Upon what authority and when are inland bills and notes protested? 17. Are unindorsed notes protested? Why? 18. Is notice of nonpayment necessary in case of inland bills and notes? 19. Must the notice be in any particular form? 20. Must it be in writing? 21. In what way must it be definite? 22. What notice is not sufficient? 23. Why? 24. Why is a notice that the paper "has been protested, &c.," sufficient? 25. Must the notice give the holder's name? 26. To whom should notices be sent? 27. To whom is the holder bound to give notice? 28. What is it then necessary for other indorsers to do? 29. What is customary in giving notice? 30. When may

the notice be served by mail? 31. How served when the parties reside in the same place? 32. Has this rule been changed? 33. What is the general rule as to proving the service? 34. What precautions must be taken when served by mail? 35. When is the service complete? 36. When is diligence considered equivalent to notice? 37. When must service be made in order to have the indorser duly notified? 38. What is the rule where the parties reside at the same place? 39. When must the notice be mailed? 40. By what mail may it go? 41. What is the rule when notice is given from party to party? 42. What will excuse delay in giving notice? 43. Who may give the notice? 44. What is the result of the holder's giving notice to all the parties? 45. Must one through whose hands the paper has passed without his indorsement be notified? 46. What indorsers need not usually be notified? 47. Is notice necessary in the case of accommodation drawers and indorsers? 48. In what other case is it not necessary to notify the drawer or indorser? 49. May the drawer or indorser waive notice? 50. Give form of waiver.

LESSON XXIV.

SALES OF PERSONAL PROPERTY.

1. Definition. ¹A sale of personal property is a transfer thereof for a price in money. ²The Indian trappers used to take their furs to a Hudson's Bay Company post and exchange them for powder, shot and provisions. This was *barter*. But they did not always want the equivalent of their furs in ammunition and stores, and hence the following plan was adopted. An otter skin was selected as the unit of value and the trappers were given little birch sticks, each representing an otter skin. These were taken at the store in payment for provisions or other supplies at any time, and served as a medium of exchange among themselves. This was a near approach to sales. ³In all early stages of society men supply their needs by bartering or exchanging what they have for what they want. ⁴Money, the unit of all values in civilized countries, is so universally distributed in our day, that the contract of sale has generally taken the place of the contract of exchange, and is one of the most usual forms of contract.

2. Necessary Conditions. We have already seen what conditions are necessary to the validity of contracts in general. ⁵These of course apply so far as they go to special contracts; but in the contract of sale a further condition is rendered necessary by the Statute of Frauds. ⁶Hence the necessary conditions in a contract of sale may be stated as follows:

1. Parties competent to contract.
2. Mutual assent of the parties.
3. The consideration or price.
4. The subject matter or the thing sold.
5. Conformity to the Statute of Frauds.

3. Parties. ⁷The parties to a contract of sale are the *buyer*, and the *seller*, or as they are frequently called the *vendor*, meaning the seller, and the *vendee*, meaning the buyer. ⁸They must be competent to contract. A lunatic is as much disqualified for buying and selling as for making any other contract. So is a minor or habitual drunkard, although as has been shown, they are liable for the value of necessities proper to their station in life, that may have been furnished to them. ⁹It is a familiar principle that no one but the owner can sell. ¹⁰A thief may drive a stolen horse into a distant state and there dispose of him to an innocent purchaser for all he is worth, but the buyer obtains no title to him. ¹¹The true owner may recover his property whenever he finds it. ¹²Like-wise the finder of a lost article cannot sell and give good title to it.

4. Mutual Assent. The minds of the parties must meet as in case of any other contract. ¹³The assent to the terms of the agreement must be mutual and

intended to bind both sides, and it must be given at the same moment of time. ¹⁴The assent need not be expressed orally, but may be implied from the conduct of the parties, or from signs, as a nod or gesture. ¹⁵So long as the party to whom an offer has been made affixes any condition to his acceptance, there is no sale. ¹⁶The party making an offer may withdraw it at any time before it is accepted. ¹⁷If the offer has been made by letter, it cannot be withdrawn after a letter of acceptance has been mailed, though not delivered. ¹⁸Nor can the party accepting retract his acceptance after he has mailed the letter containing it. ¹⁹Their minds are supposed to meet at the moment a letter of acceptance is deposited in the post office, or a telegram accepting the offer is delivered to the operator to be dispatched, and therefore there is a mutual assent at that moment.

5. Price. ²⁰In contracts of sale *price* is used to denote what in other contracts is termed the consideration. It must be either money paid or ²¹promised to be paid.

6. Express Price. ²²If the parties distinctly agree upon the amount to be paid upon a sale, there is an express price, and an express promise to pay it.

7. Implied Price. ²³Very frequently it happens that no price is fixed upon at the time of a sale and no express promise to pay is made. ²⁴A man calls at his grocer's, and says: "I want a dozen Florida oranges and five pounds of best creamery butter sent to my house." He leaves and if the grocer accepts the order there is a sale, although nothing has been said about a price or payment. ²⁵The law implies the price, which is the reasonable market value of the articles on the day of the sale. There is also an implied promise to pay this implied price.

8. ²⁶The Thing Sold, or the subject-matter, must either actually exist or have a *potential existence*, that is a possible existence, though not in fact in being. ²⁷If a horse sold be dead, or merchandise sold be destroyed by fire or otherwise, both parties being ignorant of the fact, there is no sale even though the price had been paid. ²⁸Things having a *potential existence* which may be sold, are such things as are the natural products or expected increase of something already belonging to the seller. ²⁹A man may sell the wool to be clipped from his flock of sheep, or the lambs they may bear, or the milk that his cows may yield, during a certain season, or the crops his land may produce. He can not sell the wool from any sheep or the milk from any cow which he may buy during the season. He might make a binding agreement to sell, and when he became possessed of the sheep or cow he could be compelled to make the sale absolute according to the terms of his agreement.

9. The Statute of Frauds. We have already considered the origin of the Statute of Frauds, and have found that it has been substantially reenacted in nearly all of the states of the Union. ³⁰The part of this statute which affects the sale of personal property as it has been generally adopted is as follows:

Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more shall be void, unless,

1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby: or,

2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action: or,

3. Unless the buyer shall, at the time, pay some part of the purchase money.

⁸¹ The only material alteration that has been made from the English statute is in regard to the amount of the purchase price necessary to bring a sale within the act. Most states have retained the original amount, that is ten pounds or fifty dollars. ⁸²In New Hampshire it is thirty-three dollars and thirty-three cents; in Maine thirty dollars and in Vermont forty dollars.

10. Application of the Statute. ⁸³A drover bargains with a farmer for fifty sheep at two dollars per head. There is no sale unless the drover takes away some one or more of the sheep, or pays something down, or unless a written memorandum of the sale is made and signed. ⁸⁴No formal document is required, but a simple memorandum like the following would be sufficient.

Form No. 14.

BRIGHTON, N. Y., June 3, 1887.

Bought of Glen King, this day, his flock of fifty sheep, at \$2.00 per head.

CHARLES ROBINSON.

GLEN KING.

The above memorandum would be sufficient to comply with the statute, but in case of important sales it is customary to execute a formal bill of sale, as follows, either to comply with the statute or to give the purchaser something to show for his title. The following form will illustrate a proper bill of sale:

Form No. 15.

KNOW ALL MEN BY THESE PRESENTS: That I, Mortimer D. Fitch, of Groton, N. Y., of the first part, for and in consideration of the sum of four hundred and fifty dollars, lawful money of the United States, to me in hand paid, at or before the ensembling and delivery of these presents, by Henry A. Strong, of the same place, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto said party of the second part, his executors, administrators and assigns, my flock of fifty sheep, my three-year old Jersey heifers "Neta" and "Beckey Miller," and my bay horse "Roger."

TO HAVE AND TO HOLD the same unto the said party of the second part, his executors, administrators and assigns, forever. And I do covenant and agree, to and with the said party of the second part, that I am the owner, and have the right to transfer said property, and will defend the same against any person or persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, the eighth day of June, in the year one thousand eight hundred and eighty-seven.

M. D. FITCH. [SEAL.]

STATE OF NEW YORK, }
COUNTY OF TOMPKINS, } ⁸⁵.

On this eighth day of June, in the year one thousand eight hundred and eighty-seven, before me, the subscriber, personally appeared Mortimer D. Fitch, to me personally known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

HENRY L. ACHILLES, JR.,

Notary Public.

⁸⁶ If both the buyer and seller sign the memorandum, either can enforce it against the other. If only one of the parties sign, then he alone can be made

to complete the bargain. The party not signing the memorandum can enforce the sale or not at his election.

11. Sales not Within the Statute. ³⁶Ever since the enactment of the statute, the courts of England and of this country also, have had much difficulty in determining when sales of property to be manufactured, are within the statute. ³⁷For instance if a man goes to a wagon maker for a wagon, and the manufacturer does not happen to have one on hand but agrees to make one, is it a sale of goods or a contract for labor and material? ³⁸The tendency of the American decisions is to hold that if the contract is for the sale and delivery at a future day, of articles then existing, it is a sale within the statute, but if the article is to be afterwards made, and does not actually exist at the time, it is not a sale, but a contract for work, labor and materials.

³⁹Under the original English Act only sales of "goods, wares and merchandise" were within the statute. In New York and many other states the language has been broadened so as to include things in action. ⁴⁰The sale of notes, stocks, and mortgages therefore would be governed by the provisions of the statute.

LESSON REVIEW.

1. What is a *sale of personal property*? 2. What is meant by *barter*, and how does it differ from a sale? 3. Which belongs to the earlier stages of society? 4. Why has *sale* so largely taken the place of *barter*? 5. How do the necessary conditions in the contract of sale differ from those in contracts generally? 6. Name the *necessary conditions* in the contract of sale. 7. Name the parties to the contract of sale. 8. May an incompetent person be one of the parties? 9. Who has the right to sell? 10. Give an illustration. 11. What right has the owner of a stolen horse over the animal when he finds him? 12. Does the finder of a lost article acquire title to it? 13. What is the rule in regard to *assent*? 14. How expressed? 15. What is the effect of attaching a condition to an acceptance? 16. When may a party making an order withdraw it? 17. When in case it is made by letter? 18. Up to what moment may the party accepting by letter withdraw his acceptance? 19. When is the assent supposed to become mutual and complete in case of offer and acceptance by mail or telegraph? 20. To what condition in a contract in general does the *price* correspond? 21. Of what does the *price* consist? 22. When is the price *express*? 23. When is it *implied*? 24. Give an illustration. 25. What price does the law imply in case of specific articles? 26. What rule is laid down in regard to the thing sold? 27. Give an illustration. 28. Define *potential existence*. 29. Illustrate its application in sales. 30. Give in substance the part of the statute of frauds governing the sale of personal property. 31. In what particular has the statute been changed in the different States? 32. Give illustrations. 33. Illustrate the application of the statute by an example. 34. Need the memorandum of sale be a formal document? Give a form that would be sufficient in the last illustration. 35. State the law in regard to the liability of the party

signing the memorandum. 36. What difficulty have the courts found in applying the statute? 37. Give an illustration. 38. What is the tendency of American decisions in applying the statute to contracts for the sale of property to be manufactured? 39. How have our States enlarged the provisions of the English act? 40. What are some of the kinds of property thus included under the American law?

LESSON XXV.

1. Performance of the Contract. ¹The effect of the contract of sale in passing title to the subject-matter may be immediate, and therefore an *executed sale*, or the effect of the bargain may not be to transfer the title, but simply to constitute an *executory sale*, or an agreement to sell. ²If it is an executed sale there may be (1) an actual delivery, or (2) a constructive delivery, and payment may be made at once or credit given. ³The parties, by express or implied agreement, may attach certain conditions to the sale. ⁴These make it a *conditional sale*. Such sales may be divided as follows:

1. A sale on trial.
2. By sample.
3. Goods to arrive.

2. ⁵Executory Sales, are so called in contradistinction to executed sales. They are not technically sales at all, but merely agreements to sell. ⁶The title of the thing sold does not pass to the buyer until the sale is executed, and before that time he is not the loser if the subject-matter is accidentally destroyed. ⁷An ordinary test is whether the agreement is to buy and sell certain specific goods or other property. ⁸If a drover makes a bargain for ten sheep out of a flock of fifty, at four dollars per head, and goes away without selecting them, no sheep have changed hands by virtue of the bargain, because no specific ten sheep have been agreed upon. It is an *executory sale*. If dogs should destroy the flock before the ten sheep are selected in the manner agreed upon, the loss would not fall upon the drover, because the title to the sheep had not yet passed to him.

3. Executed Sales. ⁹Suppose, however, that the drover selected his ten sheep or the parties agreed upon ten sheep bearing some particular mark, they have by that act mutually assented to a transfer of a definite thing for a definite price, and it is an executed or completed sale. The title to the sheep is in the drover. If he leaves the sheep in the flock and they are lost or destroyed it is his loss. ¹⁰He may not have a right to the possession by reason of not having paid the purchase price, in case it was a cash sale, but that fact does not throw the risk of loss upon the seller, unless of course the seller is negligent in taking reasonable care of them.

4. The Decisive Test. ¹¹The final and most decisive test in determining when there is a completed sale and the title has passed is thus stated: Does anything remain to be done by the buyer or seller, or is there any event to happen? If by the terms of the bargain nothing remains to be done by either party and the sale does not depend upon the happening of any event, there is a completed sale, and the title to the subject matter has passed to the buyer. ¹²If there is anything to be done, as that the seller was to deliver the sheep to the drover at a place agreed upon, or that the sheep were to be selected or weighed or sheared, the sale is not completed until the thing is done. ¹³It is presumed that the parties intended to make the transfer of the property depend upon the performance of the thing yet to be done, as a condition precedent to the sale.

5. "Delivery," as used in this connection, refers to the passing of the title to the thing sold from the seller to the buyer. It is the final act in the transfer. ¹⁴It is usually, but not necessarily, a transfer of the custody and also the possession. The thing sold may have been delivered, in the contemplation of the law, so that it has become the property of the buyer, and still remain in the custody of the seller. ¹⁵While ordinarily, as has been intimated, delivery is accompanied by change of possession, yet technically there may be a delivery of the thing sold without change of possession.

6. Delivery Without Change of Possession. ¹⁷The former illustration of the drover purchasing ten sheep from the flock will serve also as a simple illustration of this principle of law. When the ten sheep are in any way specified and distinguished from the rest of the flock, so that the particular ones may be picked out when the drover comes to take them away, they are legally delivered to him, though they may not have been actually separated from the rest of the flock. He may not have the right to take possession of them and drive them away, by reason of not having paid the purchase price in full, or performed some other condition, which by the terms of the bargain, he is bound to perform, and yet the terms have been fully agreed upon, and everything the seller was to do has been done, and therefore the sale is absolute and complete.

¹⁸Ordinarily unless something additional is stipulated, it is a sufficient delivery for the seller to leave the thing sold at the buyer's disposal where he may remove it at his pleasure.

7. Fraudulent Delivery. ¹⁹Delivery without change of possession, while perfectly binding upon the parties to the sale, may not be binding as to third persons who may have dealings with the buyer or seller. ²⁰Suppose the drover who has bought the ten sheep, leaves them in the field with the rest of the flock and a second drover comes along and having no knowledge of the first sale, buys the whole flock, including the ten already sold. The farmer would be guilty of a misdemeanor and would be punishable at law, but that would not be preserving the second drover from loss of the amount paid for the ten sheep, provided the first drover could claim them. But he cannot claim them. While there was a sale and delivery to him, yet there was no change of possession, and the sale would be held fraudulent and therefore void as to the second drover, who

would be entitled to the ten sheep. ²¹ It is a general rule that a retention of possession by the seller is a badge of fraud, and will avoid the sale in favor of a party who subsequently purchases the same property, in good faith and without knowledge of the previous sale. ²² But this is a hard rule and will not be enforced if there is slight evidence of change of possession, varying with the varying statutes of the different States. ²³ Thus if the first drover were to separate his sheep from the rest of the flock, though he leave them in the farmer's custody, with the latter's consent, in an adjoining field, it would be a sufficient exercise of ownership over them to enable him to hold them against future buyers.

8. Delivery with Change of Possession. This is frequently called *actual delivery* and also *delivery of possession*. ²⁴ It means a transfer of title as well as a transfer of custody and possession. It is the absolute transfer of the title to the thing sold, by the actual transfer of the possession and custody. ²⁵ In the absence of any agreement as to place of delivery, the buyer is entitled to the possession of the thing sold, at the place of sale, as soon as the terms are settled and the price paid. ²⁶ If the subject matter is to be delivered at a designated place the title to it does not pass to the buyer, nor does he suffer the loss in case it is injured or destroyed at any time before the seller sets it down at the appointed place at the buyer's disposal. It is not his until it has been brought to the designated place, and he has assumed actual or implied possession of it. ²⁷ If no time for delivery is fixed by the the terms of the agreement, the delivery must be made within a reasonable time, taking into account all the circumstances. ²⁸ When a definite time for delivery has been agreed upon, the buyer is not bound to take the things sold unless delivered within the agreed time. ²⁹ If the seller is to keep it until the day of delivery he must exercise ordinary care for its safety, and if he does so he is not liable for loss or injury to it. ³⁰ But if he neglects to turn it over at the appointed time and it is afterwards accidentally destroyed, even without his fault, he is strictly accountable for its value.

³¹ If goods are ordered from a distance it is sufficient to put them into the possession of the carrier, properly addressed and packed. ³² They are then at the risk of the buyer. ³³ If, however, they are not properly addressed or properly packed, the risk of travel will remain with the seller until they have been received by the buyer. ³⁴ If the buyer does not designate the line by which they are to be shipped, the seller must use due care in selecting a safe and proper one. Taking other things into consideration, it should be the most direct line. ³⁵ The seller should notify the buyer when the goods have been shipped.

9. Constructive Delivery. ³⁶ Where the subject matter of the sale is ponderous, and incapable of being handed over from seller to buyer, it is said there need not be an actual delivery or handling of the goods, but the law recognizes a *constructive delivery*. ³⁷ It is the doing of something which the parties intend shall be equivalent to an actual delivery, such as the delivery of the key of the warehouse where the goods are stored, or the delivery of something representing the property and the ownership of it, as a bill of lading of a ship at sea, with an assignment endorsed upon it, or of other similar documents of title to

the property assigned. ³⁸It should be borne in mind, however, that such constructive delivery if not followed by an actual change of possession is not good as against third parties, as we have already seen.

LESSON REVIEW.

1. What is an *executed sale*?
2. What kinds of delivery may be had under an executed sale?
3. What is a conditional sale?
4. How may conditional sales be divided?
5. What is meant by an *executory sale*?
6. When does the title pass under an executory sale, and until what time is the property at the risk of the seller?
7. What is the ordinary test?
8. Give an illustration.
9. What would have made the last illustration an *executed sale*?
10. Must the buyer have a right to the possession of the property before the title can pass?
11. What is the decisive test in determining whether there is a completed sale?
12. What is the effect if anything remains to be done?
13. What presumption arises in such cases?
14. What is the meaning of *delivery* as used in sales?
15. How does it affect the custody of the property?
16. How do the popular and technical meanings of delivery differ?
17. Illustrate *delivery without change of possession*.
18. What is ordinarily a sufficient delivery?
19. What is the effect as to third parties of a delivery without change of possession?
20. Give an illustration.
21. What is the general rule regarding the retention of possession by the seller?
22. What evidences of change of possession are sufficient? Give an illustration.
23. What is *delivery with change of possession* sometimes called?
24. What does it mean?
25. Where no place is fixed what is the rule as to delivery?
26. What is the rule where the place is designated?
27. What is the rule where no time for delivery is fixed?
28. When a time is fixed for the delivery, what is the effect of a failure to deliver at that time?
29. What liability has the seller for the care of property before the day of delivery?
30. How does a failure to deliver at the appointed time affect such liability?
31. How does the seller deliver goods ordered from a distance?
32. When is he relieved from risk of loss or injury to the property?
33. How may his neglect or mistake extend his liability?
34. What is the seller's duty in case the buyer does not designate the line by which the property is to be sent?
35. What notice should he give?
36. When is an actual delivery not necessary, and what delivery is then recognized by law?
37. What is *constructive delivery*? Give illustrations.
38. What is necessary to make constructive delivery good as against third parties?

LESSON XXVI.

1. **Payment.** ¹When the bargain embraces no stipulation to the contrary, it is always implied that payment in cash is to be made on delivery. ²If there is to be a conditional payment by promissory notes or acceptances, or if credit is to be given, the buyer must make stipulations to that effect. ³If it is a cash

sale and the price be not paid, the buyer has no right to the possession of the thing sold, even though it has been delivered to him, as the seller has a lien upon it for the price. ⁴And if the price is not paid within a reasonable time the seller may treat the sale as void, or he may hold the goods subject to the buyer's order and sue him for the purchase price. ⁵Whenever the title to the thing sold has passed to the buyer, no matter whether it has actually come into his possession or whether it is destroyed and he never receives it, he is in peril of being sued by the seller for the purchase price, without demand. ⁶And even though the property in the thing sold has not passed to the buyer, if he has assumed the risk of delivery he must pay the price, even though the property is injured or destroyed on the way.

2. Payment by Note. ⁷If the buyer gives his promissory note for the price, or indorses or transfers the note of another, it is never a payment unless accepted as such, and the seller's right to the purchase price revives upon non-payment of the note or other security. ⁸He may proceed against the buyer upon the note, or he may return the note and sue for the price. But the seller may take the note as an absolute payment if he chooses. ⁹The intention to do so, however, must be clearly and expressly shown. ¹⁰It will not be presumed from such expressions as "in payment" for the goods or "in discharge" of the price. ¹¹If the buyer offers cash, but the seller takes a note or other negotiable security in preference, then it is clear that he takes the note or other paper as absolute payment. ¹²An exception to the rule is the case of a bank check given for the purchase price. If the seller delays presenting it, and by reason of the delay the buyer is injured, as, for example, by the failure of the bank, it having been good when the check was given, then the giving of the check will constitute an absolute payment.

3. Tender. ¹³We have seen that as soon as the bargain is made it is the duty of the buyer, if credit is not given, to pay the purchase price, or he is liable to be sued for it without any previous demand. ¹⁴He can escape this liability only by a tender of payment, which is as much a performance and discharge of his duty as an actual payment. ¹⁵As we have seen, to constitute a tender the money must be actually produced and offered to the seller, unless he distinctly waives that formality; it must be in money that has the quality of legal tender, and no condition may be imposed upon its acceptance. ¹⁶If the person making the tender is not certain as to the amount due he may tender more than enough, but he cannot accompany the tender with a demand for change if the other objects to giving change; ¹⁷but if he does so accept the larger amount he is liable to be sued for the excess. ¹⁸The effect of a legal tender we have also seen is to stop the accumulation of interest and prevent costs. The debt itself is not extinguished. ¹⁹The party making the tender must hold himself in readiness to make it good at any time and show a willingness to pay at all times afterward. ²⁰If he is sued he should bring the money into court, and he will not have to pay costs of the suit or any interest after the tender.

4. Credit. As has been said, the law presumes that in the absence of any agreement the purchaser is to pay cash. ²¹ If he expects credit he must make that a part of the bargain. If credit is given there are several ways in which it may affect the relation of the parties to each other and to the thing sold. ²² The seller has no longer a lien for the purchase price, but the title and also the right of possession passes to the buyer. ²³ If, however, the buyer has become insolvent before obtaining actual possession, then the seller may refuse to part with the thing sold, even though credit was a part of the bargain. And likewise, if the seller agreed to accept the note of a third party, who becomes insolvent before the property has changed possession, then too the seller may refuse to deliver. ²⁴ When the credit is for a definite time and the seller still has the property in his possession at the expiration of the time, then he may assert a lien upon it for the price, as though it were a cash sale. ²⁵ Sales on the "installment plan" are of very frequent occurrence. It is a sale in which credit is given for the whole or a part of the purchase price, and on the express understanding that the title to the property shall remain in the seller until the full payment of the price. The buyer gets the possession, but not the title. ²⁶ Having the possession, he is in a position to defraud others, who have no knowledge of his lack of title, by selling to them. ²⁷ Therefore it is enacted by statute in New York and some other States, that a sale by the terms of which the seller retains title to the property and at the same time gives possession to the buyer, shall be void as to creditors of the buyer and those who purchase of him in good faith, unless the contract of sale be in writing and recorded or filed among the public records.

5. Conditional Sales. ²⁸ A sale on condition is one in which, by the terms of the bargain, one of the parties is to perform some act or some event is to happen before the sale is complete. ²⁹ The title to the thing sold does not pass to the buyer until the act has been performed or the event has taken place. ³⁰ A sale of the kind discussed in the last section, where it is expressly agreed that the title to the property shall remain in the seller until the price is paid, is a conditional sale. The condition is that the buyer pay the price, and if he fails there is no sale. The seller has never parted with the property. ³¹ Strictly speaking, sales on condition are not a species of contract to be distinguished from executory sales, which have already been discussed. A sale of a thing to be delivered on or before a certain day is an executory sale and also a sale on condition, the condition being that the property shall be delivered as agreed. There is no sale unless the delivery is made. The same is true of a sale of goods to be delivered upon request. The request is a condition precedent to a sale, and the buyer must make the request before he can sue for the breach of contract. And likewise, when a thing is sold by description, it is an implied condition that the bulk shall correspond with the description. ³² But the certain kinds of sales commonly made, upon conditions well recognized and known, to which the name *conditional sales* is aptly applied, are, as we have seen, sales (1) on trial, (2) by sample, and (3) of goods to arrive.

6. ³³ Sales on Trial are sales in which, by the terms of the bargain, the

purchaser is to have possession of the thing sold for the purpose of testing, proving or trying it. ³⁴It is sometimes called *sale on approval*. ³⁵The buyer is bound to try the article within the time specified, and if no time is specified, then within a reasonable time. ³⁶If the trial naturally involves an injury to or consumption of the article tried, the loss, if any, falls upon the seller, provided that it is no greater than is necessary for the trial. ³⁷The buyer has the whole time within which to make up his mind, and not until he has expressed his approval does the sale become absolute. If he does not approve it then he must return it or inform the seller. ³⁸If he does not return it within the agreed time, or within a reasonable time in case no time was specified, then the law will imply that he approves of it, and the sale is absolute.

7. Sales by Sample. ³⁹It frequently happens that the thing sold is not exhibited to the buyer, but instead the seller furnishes a description or sample. ⁴⁰If a description is given, there is an express warranty that the article agrees with the description. A discussion of the questions arising in such a case is given in later pages of this work under *Warranty*. ⁴¹In a sale by sample it is an implied condition also that the thing sold shall correspond with the sample, and if it does not, the buyer need not complete the sale. ⁴²The sale is not therefore completed until the buyer has had an opportunity of inspecting the goods in bulk and comparing them with the sample. ⁴³If he finds that they do not correspond with the sample, he should at once give notice to the seller, since, if he is silent, he may by implication be held to have accepted the goods.

8. Sales of Goods to Arrive. ⁴⁴This is a sale of merchandise expected from abroad, before the vessel conveying it has arrived. The condition is that the merchandise shall arrive as expected. ⁴⁵There may, however, be an absolute sale of goods not yet arrived. ⁴⁶An example of this would be where the seller has a bill of lading of the property and he delivers it to the buyer, having endorsed an assignment upon it, the intention of the parties being that the title to the property shall pass to the buyer. ⁴⁷It is the latter's loss if the goods do not arrive, while if the sale is conditioned upon the arrival, the risk is still with the seller until they are received at port.

LESSON REVIEW.

1. When is payment in cash implied?
2. What is necessary in case payment is to be made otherwise?
3. When has the buyer in a cash sale a right to possession of the thing sold?
4. What effect has non-payment of the price by the buyer within a reasonable time?
5. What is the rule as to liability of the buyer for the purchase price after title has passed?
6. When may he be liable for loss before the title has passed to him?
7. When is the giving of a note not payment?
8. What right in such case has the seller upon non-payment of the note?
9. What must be shown to constitute the taking of a note as payment?
10. Will the intention be readily presumed?
11. What fact will show an intention to accept a note or other security as payment?
12. When is the giving a check an exception to the rule and held to constitute payment?
13. Restate the buyer's duty and liability in case credit is not given.
14. How

may he escape the liability? 15. What constitutes a tender? 16. What may the person making a tender do in case he is not sure as to the exact amount due? 17. What liability does the seller incur by accepting more than the amount due? 18. State again the effect of a legal tender. 19. What more must the party do than simply make the tender? 20. What should he do in case he is sued, and what will be its effect? 21. What must the buyer do in case he wants credit? 22. What effect upon the seller's lien has the giving of credit? 23. What exceptions are there to the rule in case of the buyer's insolvency prior to actual possession? 24. What right has the seller in case credit is given, but he has possession after the expiration of the time given for payment? 25. What is meant by a sale on the *installment plan*? 26. What opportunity does such a sale give the buyer to defraud third parties? 27. What statutes have been passed as a result of this danger? 28. What is a *conditional sale*? 29. When does the title pass under a conditional sale? 30. Give an illustration of a *conditional sale*. 31. What relationship do conditional sales bear to *executory sales*? 32. Restate the divisions of conditional sales. 33. What is a *sale on trial*? 34. What else is it called? 35. When must the buyer make the trial? 36. When does the loss attending the trial fall upon the seller? 37. What are the buyer's rights and duties in case of such sale? 38. What liability does he incur by not returning the property at the proper time? 39. What is a *sale by sample*? 40. What warranty arises in case a description is given? 41. What condition is implied in a sale by sample? 42. When is such a sale completed? 43. Why should the buyer give immediate notice to the seller if the goods delivered should not correspond with the sample? 44. What is meant by a *sale of goods to arrive*? 45. May there be an absolute sale of goods to arrive? 46. Give an illustration. 47. What is the rule of liability in case of the sale of goods to arrive?

LESSON XXVII.

1. Warranty. ¹Warranty in a sale of personal property is an undertaking on the part of the seller that the property is as represented and described. ²It is not one of the essentials of the contract, for many sales are made without any warranty attached. ³Where it exists, however, it must form a part of the contract, and hence representations made before the sale and not connected with the negotiations leading to it are not warranties. For the same reason, representations made after the sale is completed are not such warranties that the buyer may rely upon them, unless they are made upon a new consideration additional to the purchase price. ⁴Thus, if I have a horse for sale, and on coming to examine him you ask me if he is sound and I reply that he is, but you decide not to take him at my price and go away, intending to terminate all negotiations, my statement as to his soundness would not be a warranty accompanying a future

sale to you. You might come again at a future day and begin again negotiations resulting in a sale, but you would have no warranty unless I made one during the transaction. It is supposed in this illustration that the first interview formed no part of the transaction or negotiations taking place at the time of the sale. ⁸ If it were a part of such transaction, as if you should say that you would think the matter over and let me know the result, then the statement would be a warranty, although the full terms of the bargain were not finally agreed upon until a later day.

⁹ If, however, after the sale is completed, and you have taken the horse and paid your purchase price, you come again and ask me if he is sound, no representation I may make would be a warranty. ⁷ But if the seller at the time of the sale or during negotiations leading to the sale, assumes to assert a fact about the subject-matter of which the buyer is ignorant, it operates as a warranty for which the seller is accountable if it is untrue; ⁶ and it makes no difference whether or not he is aware that it is untrue.

⁹ As to representations made before the sale and not connected with it, while they may not be warranties, yet if the seller knew them to be false, he would be accountable for fraud, as we shall hereafter learn.

2. Divisions of Warranty. ¹⁰ The two main classes or divisions of warranty, with subdivisions, are as follows:

Warranty.	{	1. Express.	{	1. Warranty of Title.
		2. Implied.		2. Warranty of Quality.

3. ¹¹ Express Warranty, is a warranty expressly made by the seller at the time of the sale. ¹² It may relate to any fact about the thing sold, the truth of which is unknown to the buyer. ¹³ It is not necessary that the seller use the word *warrant*. ¹⁴ During the negotiations on the sale of a horse, if the seller says "He is sound except for the splint on his right fore leg," and he asserts that fact to assure you of its truth and induce you to purchase, relying upon the statement, it is an *express warranty*; and if the horse is unsound in any other particular, the seller is liable for a breach of warranty. ¹⁵ But a seller may state qualities of his property in commendation of it and express opinions of it of a favorable nature which will not amount to warranties. ¹⁶ A warranty of a general nature as "the horse is all right" will not cover a manifest imperfection, such as the loss of an ear.

4. ¹⁷ Caveat Emptor, is a commonly used latin phrase and expresses a legal maxim. It means "let the purchaser beware," and applies to a case in which the thing sold is before the buyer and he examines it. He is bound to use his eyes and ears to discover manifest defects, or else require an express warranty from the seller. ¹⁸ He takes the risk of quality upon himself when the thing is open to his inspection, and must bear the loss unless he can show that deceit was used to conceal defects or delude him, or unless an express warranty was made in regard to defects complained of.

5. ¹⁹ Implied Warranty of Quality, is a warranty which the law implies as to the merchantable quality of a thing sold, when it is not submitted to the

buyer, or from its nature is not subject to complete inspection. ²⁰ If the seller shows the buyer a sample only, there is always an implied warranty that the bulk corresponds with the sample. ²¹ Where a thing is to be made or supplied upon the order of the buyer, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or fit for the specific purpose of the buyer, if he communicates that purpose at the time he gives his order. ²² If I step into a shoe store and ask for a pair of walking shoes, and a pair is selected by the dealer, to whose judgment I trust, there is an implied warranty that they are reasonably fit for walking. In a sale of goods by description, where the buyer has made no inspection, there is always an implied warranty that the goods are salable or merchantable. ²³ And whenever articles of food are sold by one who deals in them to a consumer, there is an implied warranty that they are wholesome and fit for consumption.

6. ²⁴ Implied Warranty of Title, is a warranty that the thing sold belongs to the seller, and that he has a right to dispose of it by sale, but this is only implied in case he has it in his possession at the time of the sale. ²⁵ It is not necessary for him to assert that it is his in order to give rise to the warranty. The law implies it without anything being said in regard to the fact. ²⁶ If the thing sold is afterwards taken from the buyer by some one having a better title than the seller, then the latter is answerable, irrespective of whether he knew of the fact that his title was defective.

²⁷ But if the seller is not in possession of the thing sold, and he makes no affirmation of ownership, the buyer assumes the risk of title, because the seller's want of possession is enough to put the buyer on his guard, and he should require an express warranty of title.

7. Illustration. ²⁸ A horse-thief steals a horse from A and sells it to B, who may or may not have knowledge of the theft. B takes the horse and sells it to C. Afterwards A, the rightful owner, discovers the horse in the possession of C, and claims him. C must surrender the animal, since neither he nor B had any title to him. B is answerable to C, however, for the purchase price, even though he made no express claim of ownership.

8. Stoppage in Transitu. ²⁹ The right of stoppage in transitu is that right possessed by the seller of personal property upon credit, who has shipped it to the buyer, to stop it before it has reached him, upon learning of his insolvency.

9. Necessary Conditions. ³⁰ There are at least three necessary conditions upon which the exercise of this right depends, as follows:

- { 1. A thing sold in transit.
- { 2. Indebtedness of the buyer for the price.
- { 3. Insolvency of the buyer.

10. ³¹ The Thing Sold must be actually in transit from the seller to the buyer. It must have left the possession of the seller and must not have come into the actual possession of the buyer, so that the exercise of this right implies the existence of a carrier or middleman, in addition to the buyer and seller, and the thing sold must be in the possession of the carrier, or third party, for trans-

portation from the seller to the buyer. ³² If this possession is not for the purpose of conveyance, but as agent for the buyer for safe custody, and at the buyer's disposal, then the right of stoppage in transitu is lost.

11. ³³ Indebtedness of the Buyer, for the price, must also exist; but it is not necessary that the whole of the purchase price be due from the buyer. ³⁴ He may have paid part and received credit for the balance; and the fact that he may have given negotiable paper, or securities, for the whole price, will not prevent the seller from exercising the right, unless such paper was received as an absolute payment.

12. Insolvency of the Buyer. ³⁵ This must have occurred, or the seller must have discovered it, after the sale. ³⁶ By insolvency is meant a general inability on the part of the buyer to pay his debts; and this may be shown by the fact of his having made an assignment for the benefit of his creditors, or having failed to pay one just and admitted debt, or having "stopped payment." ³⁷ If the seller stop goods in transit to the buyer before the latter has become insolvent, he does so at his peril. If the buyer were still solvent when the goods arrived at their destination, and the seller had exercised his right of stoppage in transitu, he would be bound and could be compelled to deliver them to the buyer, and to indemnify him for injury caused, or expenses incurred, by reason of the delay.

13. How the Right is Exercised. ³⁸ It is not necessary for the seller to take actual possession of the thing sold while in the hands of the carrier or middleman. ³⁹ All that is required is some act or declaration of the seller countermanning the delivery. ⁴⁰ The usual course is simply for the seller to give the carrier notice that he claims the right to stop the goods *in transitu*, at the same time forbidding their delivery to the buyer, and requiring that they be held subject to the seller's order. ⁴¹ Let us suppose an ordinary case. A boot and shoe manufacturer at Rochester receives an order from a customer in Chicago for a case of shoes. He ships it by the American Express Company. The next morning he discovers by his daily commercial report that the buyer has failed. ⁴² Now he may go himself, or send an employee, to the Express office, and tell the agent to stop the delivery of the shoes, or what would be better, he may put the notice in writing, in the form of a letter, as follows:

Form No. 16.

⁴³ ROCHESTER, N. Y., July 25, 1887.

TO THE AMERICAN EXPRESS COMPANY,

Gentlemen:—I delivered to you yesterday one case of shoes consigned to Samuel C. Hasson, Chicago, Ill. Circumstances are such that I have the right of stoppage in transitu. Do not, therefore, deliver the case of shoes, but hold the same subject to my order.

Yours, &c.,

WILLIAM A. STERNBERG.

⁴⁴ He may send this by mail, but in that case he might have to prove that it was actually received, and would find it difficult to do so, hence he delivers it to the express agent personally. ⁴⁵ If the express company delivers the case after

receiving this notice, it is liable for whatever loss the shipper may sustain by reason of such unauthorized delivery.

LESSON REVIEW.

1. Define warranty in a sale of personal property. 2. Is it an essential of the contract? 3. What representations do not constitute warranties? 4. Give an illustration. 5. How may representations made before the sale become warranties? 6. Is a representation made after the sale is complete, a warranty? 7. What is the effect of the assertion of a fact by the seller about the subject matter, of which the buyer is ignorant? 8. Must the seller be aware of its untruthfulness? 9. How may the seller be accountable for representations made before the sale, which he knew to be false? 10. What are the divisions and sub-divisions of warranty? 11. What is an *express warranty*? 12. To what may it relate? 13. Must the seller use the word *warrant*? 14. Give an illustration showing how such a warranty may be made. 15. What may a seller say about the thing sold that will not amount to a warranty? 16. Show by illustration, whether a general warranty covers an apparent imperfection. 17. What is the meaning of *caveat emptor*, and in what cases does it apply? 18. When does the buyer take the risk of quality? 19. What is implied in warranty of quality. 20. What is implied on sale by sample? 21. What is implied when the thing is made or supplied upon order? 22. Give an illustration. 23. What warranty is implied where a dealer supplies goods for consumption? 24. Define *implied warranty of title*. 25. Must the seller assert his ownership? 26. Is the liability of the seller affected by his want of knowledge concerning the defect of title? 27. How is his liability affected by his not being in possession of the thing sold, and why? 28. Give an illustration showing seller's responsibility under an implied warranty of title. 29. What is the right of *stoppage in transitu*? 30. How many, and what are its necessary conditions? 31. Explain what is meant by the *thing sold in transit*. 32. What possession by the carrier will not allow the seller the right of stoppage in transitu? 33. Is it necessary that the whole purchase price should remain unpaid to allow the seller this right? 34. What is the effect upon the seller's right, where he has given negotiable paper or securities? 35. When must the buyer's insolvency have occurred or been discovered? 36. What is meant in this connection by *insolvency* and how may it be shown? 37. What effect upon the seller follows his stoppage of the goods sold before the buyer has become insolvent? 38. Must the seller take actual possession of the thing sold in the exercise of his right of stoppage in transitu? 39. What is required to effect that purpose? 40. What is the usual course? 41. Give an illustration. 42. How may he give notice to the carrier? 43. Give the substance of a written notice that would be sufficient in the case proposed. 44. Why is it not advisable to send the notice by mail? 45. What liability would the express company incur by delivering the goods after receiving such notice?

LESSON XXVIII.

1. Rescission of a Sale. ¹The rescission or avoidance of a contract of sale is its annulment or abrogation by one of the parties, who refuses to complete it, or in case it has been completed, seeks to set it aside and place himself in the position in which he stood before the sale.

2. Grounds for Rescission. ²There are five grounds upon which a party may rescind. They are—

1. Mutual mistake.
2. Fraud.
3. Breach of warranty.
4. Failure of consideration.
5. Illegality.

3. Mutual Mistake. ³This is the ground of rescission when both parties have been mutually mistaken as to some material fact relating to the thing sold, and have made the bargain and all its terms while laboring under the mistake. Suppose that a miner has a bar of silver to sell. ⁴He takes it to a jeweler who agrees to buy it, but before the price is fixed it is to be assayed. It is returned and upon the result of the assay the jeweler makes an estimate of the price he can afford to give and the bar is transferred. It is afterwards discovered that the assayer has made a mistake in his computations, of which both the jeweler and the miner were ignorant. ⁵Hence the party who has been the loser by the mistake may rescind the sale, because there was a mutual mistake of fact—a mistake as to the amount of silver contained in the bar. If there was less than the parties supposed, the jeweler may return the bar and demand the purchase price, or on the other hand the miner, if he has been the loser, may return the money and demand the bar.

⁶The mutual mistake for which a sale may be rescinded may be a mistake as to the quantity of the thing sold, or its quality, kind or condition. ⁷The party seeking to rescind a sale must do so as soon as he discovers the mistake; and if he has done anything so that he cannot restore the thing sold substantially in the same condition as at the time of sale, a rescission of the contract will not be allowed, and the same is true of a rescission on any other ground. He must content himself with a compensation in damages.

4. Fraud. By the last section it was shown that a sale might be rescinded on the ground of mistake, *if both parties were mistaken*. ⁸In the case of the sale of the bar of silver, suppose the assayer had made no mistake, but the jeweler makes a mistake in reading the assayer's figures and thereby is led to believe that the bar contains more silver than it actually does. The miner, however, reads the figures correctly, and knows how much silver he is selling. He knows nothing about the jeweler's mistake and accepts and departs with the price offered. There has been a mistake, but it was not mutual, and will not authorize the rescission of the sale.

° But suppose the miner knew of the jeweler's mistake and allowed him to buy without informing him, and thereby the jeweler paid for more silver than he actually received. In that case the seller would be guilty of fraud and the sale could be rescinded by the jeweler on the ground of fraud. Either party injured by the fraud of the other may rescind. ¹⁰ A fraud may consist in the passive but willful concealment of a material fact as in the above illustration, or it may show itself in willful, positive misrepresentation and deceit. ¹¹ The party seeking to rescind a sale on the ground of artifices employed by the other, must have been actually deceived by them. If he sees through them but does not expose the fraud he has not been deceived and cannot rescind the sale. ¹² And there must be further, an intent to defraud. ¹³ A man desiring to sell his horse, may represent him to be sound, whereas unknown to him the animal may have the glanders. His representation though in fact false is nevertheless not fraudulent, and does not authorize a rescission of the sale for fraud. But in such a case the buyer might annul the sale on the next ground of rescission.

5. Breach of Warranty. As to the right of a buyer to rescind a sale, after the title to the thing sold has passed to him, the authorities do not agree. It is one of those perplexing questions met with in law as in every other science. ¹⁴ It is proper to say that the weight of authority is against the proposition that the buyer may return the goods for a breach of warranty after the title has passed to him. ¹⁵ In that case he can only sue for damages where he has paid the price, or make a counterclaim for his damages, if the seller sues for the purchase price. ¹⁶ But if the title has not passed to the buyer as if the sale was by sample or description, and an examination of the bulk reveals the fact that the goods do not correspond with the sample or description, then it is clear that the buyer may refuse to accept the goods and rescind the sale.

6. Failure of Consideration is another ground of rescission. ¹⁷ Thus, if the buyer of a horse afterwards discovers that the animal was a stolen one, and that the seller had no title, he may return him and recover the price paid. In such a case there is said to be a total failure of consideration. ¹⁸ But there is not such a failure of consideration as to avoid the sale where the buyer is fully acquainted with the subject matter and receives what he intends to buy, although it should turn out to be wholly worthless.

7. Illegality. ¹⁹ Under this head there are three grounds authorizing the rescission of the contract of sale, viz.: (1) when it is illegal in purpose, (2) when the subject matter is illegal, and (3) when the contract is illegal by statute. A sale falling under any of these divisions is not only open to rescission, but either party having knowledge of the illegality and sharing in it is prevented by the rules of the common law from reaping any benefit from the transaction.

8. Illegal in Purpose. ²⁰ This is illustrated by a sale of articles to be used for gambling. If the seller knows of the illegal use to which the articles are to be put, he cannot recover the purchase price. ²¹ In like manner if a druggist sells drugs, knowing that they are to be used to adulterate food, contrary to law, he can recover nothing for them, although they may be entirely harmless.

9. Illegal Subject Matter. ²² Obscene books, indecent pictures, gambling apparatus and things of like nature are considered evil and noxious things in themselves, and their possession is illegal. Any contract for their sale is voidable, independent of the purpose to which they are to be put. Such things are said to be contrary to public policy and good morals.

10. Illegal by Statute. ²³ There are many contracts of sale which would be valid and binding on both parties if they were not forbidden by statute. A familiar illustration is that of the sale of spirituous liquors as regulated by excise laws. If the law forbids such sales except the seller have a license, and he actually does sell without, then the contract is voidable at the option of the purchaser. ²⁴ The same is true of any article, the sale of which is regulated by statute. ²⁵ A contract of sale contrary to the statute will not be enforced.

LESSON REVIEW.

1. What is meant by the *rescission of a sale*?
2. How many and what are the grounds of rescission of the contract of sale?
3. What is such a mutual mistake as will authorize the rescission of a contract?
4. Give an illustration.
5. Which party may rescind the sale?
6. What may the mistake concern?
7. What must the party seeking to rescind do?
8. Vary the last illustration so it will show a mistake that will not authorize a rescission of the contract.
9. Vary it again so it will show a fraud upon which the contract could be abrogated.
10. In what may a fraud consist?
11. How must the party seeking to rescind be effected by misrepresentations or deceit?
12. What else is necessary?
13. Distinguish between *false* and *fraudulent* representations.
14. Is it generally held that a buyer may return goods after the title has passed to him on the ground of a breach of warranty?
15. What may he do in that case?
16. When may the buyer rescind for breach of warranty?
17. Illustrate what is meant by a total failure of consideration.
18. When is there a failure of consideration not sufficient to avoid the sale?
19. How many and what are the special grounds of illegality for which a contract may be avoided?
20. Illustrate what is meant by *illegal purpose*.
21. In what case may a druggist be unable to recover the purchase price of drugs?
22. What is meant by illegal subject matter?
23. Give illustrations of sales valid otherwise but made void by statute.
24. Is this true of any article the sale of which is regulated by statute?
25. Will a contract of sale contrary to statute be enforced?

LESSON XXIX.

AGENCY.

1. Its Importance. It will be noticed that one of the central branches in the frontispiece is very massive as it springs from the trunk, but almost immediately divides, sending off the large branch of *partnership*, and continuing as *agency* proper. ¹The reason is that *agency* is one of the largest and most important of all business relations; and as we shall see later, the law of partnership is the law of agency developed in a particular direction. Hence it follows that the law of *agency*, or ²*principal and agent* as it is usually called in the books, is one of the very important divisions of commercial law.

2. Definitions. ³It is a doctrine of law that, in business affairs, whatever a person has the power to do in his own right, he may appoint an agent to do for him; but he cannot appoint an agent to do what he could not personally do. ⁴An *agent*, then, is any person who is employed by another to do any act for the employer's benefit or account; ⁵the one employing an agent is called the *principal*; ⁶and the business relationship thus existing between them is *agency*. ⁷A person dealing with the agent is termed a *third party* or *third person*. ⁸Anyone therefore may be a *principal* who is not under any of the disabilities that preclude a person from making a valid contract. ⁹But on the other hand the *agent*, since he does not need to bind himself, may be any person of sufficient understanding to transact the business committed to his charge. Hence, an infant, though unable in most cases to bind himself by contract, may nevertheless, if properly authorized, bind his principal as effectually as such principal could bind himself.

3. How Appointed. ¹⁰An agent may be appointed by parol to do all acts and make all contracts, except such as are required by law to be executed under seal. ¹¹Agents are perhaps more frequently appointed by letter or orally; but the formal way of constituting an agent is by *power of attorney* executed under seal. ¹²He must be appointed in the latter mode in order to be authorized to convey lands or execute any other instrument under seal. The following is a usual form of power of attorney.

Form No. 17.

KNOW ALL MEN by these presents that I, Joseph W. Robbins, of the city of Syracuse, New York, have made, constituted and appointed, and by these presents do make, constitute and appoint, John I. Booth, of the city of Indianapolis, Indiana, my true and lawful attorney, for me, and in my name, place and stead, *to grant, bargain and sell all my real estate situate in said city of Indianapolis, or any part thereof, for such price, and on such terms, as to him shall seem best, and for me, and in my name, to make, execute, acknowledge and deliver good

and sufficient deeds and conveyances for the same, either with or without covenants of warranty,* hereby giving unto my said attorney full power to do everything whatsoever requisite and necessary to be done in the premises, as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 15th day of February, in the year one thousand eight hundred and eighty-seven.

JOSEPH W. ROBBINS. [SEAL.]

STATE OF NEW YORK, }
COUNTY OF ONONDAGA, } ss

On this 15th day of February, 1887, before me, the subscriber, personally appeared Joseph W. Robbins, to me known to be the same person mentioned in and who executed the foregoing power of attorney, and acknowledged the same to be his free act and deed.

MORTIMER D. FITCH,
Notary Public.

Where the authority conferred is to execute a deed, mortgage or any other instrument that is to be recorded, the power of attorney must be itself so executed as to entitle it to be recorded at the same place. ¹³ This requires that it shall be acknowledged, substantially, as in the foregoing form, that is that the person who has signed the paper shall go before a notary public or other proper officer, as a justice of the peace, a judge, commissioner of deeds, etc., and acknowledge that he executed the same; ¹⁴ or in some of the states, it may be signed by a witness and his affidavit added showing that it was properly executed in his presence. It is best always to have a power of attorney acknowledged or at least witnessed, but except in the cases above mentioned it is not necessary.

¹⁵ It will be noticed that the part of the foregoing form included between the asterisks or stars, sets forth the particular act or business to be done by the agent—selling and conveying real estate in that case—and, therefore, by inserting in its place the proper words, the general form may be adapted to almost any kind of business. For example if it were desired to authorize the agent to collect debts, then the following might be thus inserted:

Form No. 18.

To ask, demand, sue for, collect, receive and give acquittance for all sums of money, debts and demands whatsoever which are or shall be owing to me by any person or persons residing or being at said city of Indianapolis.

4. Authority, How Proved. ¹⁶ Where there is a power of attorney, letter, or other writing, that will determine the agent's powers. ¹⁷ In other cases his authority may be proved by circumstances or by the conduct of the principal. ¹⁸ By allowing another to hold himself out to the world as his agent, the principal adopts his acts and will be held bound to the person who thereafter gives credit to the other in the capacity of his agent, ¹⁹ as where one repeatedly sends his servant to a store to buy goods on credit, he would be responsible to the merchant for goods afterwards bought by the same servant without his authority.

5. How Divided. ²⁰ Agency is divided into two branches, viz.: *general* and *special*. Under the former the agent is called a *general agent*, and under the latter a *special agent*.

6. ²¹**A General Agent**, is one who is authorized to transact all his principal's business of any particular kind. ²²The authority of a general agent is measured by the usual extent of his employment—by the apparent authority held by him as shown by his acts done with the knowledge of his principal. ²³The acts of a general agent while acting within the general scope of his authority will bind his principal whether in accordance with his private instructions or not. The public or third persons are not bound to inquire into the terms of his authority.

²⁴Where an agent acts fraudulently, and some one must be the loser by his deceit or fraudulent conduct, it is just that he who employs and reposes confidence in him should be the loser rather than a stranger. ²⁵A teller of a bank who certifies the checks of customers with the knowledge of the officers of the bank exercises a general authority. He is a general agent of the bank for that purpose, and if he fraudulently certifies the check of a customer without funds, the bank is liable to one who takes the check in good faith.

7. ²⁶**A Special Agent**, is one who is appointed for a special purpose, and is clothed with a limited authority. ²⁷His acts do not bind his principal beyond the scope of such authority, ²⁸as where an agent is authorized to sign a note payable in six months, and he signs one payable in sixty days, such note will be void. If an authority be given to an auctioneer to sell a piece of real estate for not less than \$2,800, he cannot bind his principal by a sale for a less price. ²⁹Hence a person who deals with a *special agent* should be sure that such agent acts within the precise limits of his authority, otherwise the principal will not be bound. ³⁰If, however, the agent follows strictly the line of his authority as it is shown to the public, his principal will be bound, notwithstanding he may have given his agent private instructions still further limiting his special powers. ³¹Within the scope of the business intrusted to the agent, whether that business be general or limited, his acts and representations will bind his principal: that is, his principal is answerable for the truth of what he says, as where he is authorized to sell a note and falsely represents it to be valid business paper, when in fact it is not.

8. **Implied Powers.** ³²An agent has certain incidental powers which are implied from the circumstances, that is, they are not stated in exact terms, but are understood. Where he is authorized to sell goods, he may do so on a reasonable credit if such goods are usually sold on credit. ³³An authority to sell personal property, which is commonly or often sold with a warranty, enables the agent to bind his principal by a warranty. An authority to sell goods, that are intrusted to the possession of an agent, includes a power to receive payment; a general power to buy goods will authorize an agent without money to buy on credit. The fact that an agent was authorized by his principal to sell certain real estate, and that it was the custom of the locality to make such sales through brokers, authorizes the agent to employ a broker to negotiate the sale. An agent exercises a delegated power. On this elementary principle a merchant's clerk not authorized to do so, cannot bind him by signing notes in the merchant's name.

9. **Construction of Special Powers.** ³⁴A person dealing with an agent

is chargeable with notice of the authority conferred upon him. He is bound to examine and understand the power when it is in writing. ³⁵ General words are to be construed as limited to the business to be transacted. ³⁶ For example, where a special power, as in form No. 17, is given to an agent to sell and convey real estate, if the general words "and to do any and every act which I could do in person" were inserted, they would not confer any new power or add in any way to the agent's authority.

10. Notice to Agent. ³⁷ The agent represents the principal in the business, and the principal is deemed to have notice of whatever is communicated to his agent. The knowledge of the agent, while acting for him, is imputed to the principal.

³⁸ A principal is also chargeable with knowledge of the acts of his agent, done in execution of his authority. For example, he is chargeable with notice of a contract made by a sub-agent appointed by a general agent, who had power to make such an appointment.

³⁹ It is also a rule of law that notice to the principal is notice to the agent.

LESSON REVIEW.

1. Why is the branch of agency so massive? 2. What is the law of agency otherwise called? 3. Upon what doctrine of law is agency based? 4. Define *agent*. 5. Define *principal*. 6. What is *agency*? 7. Who are *third persons* or *parties*? 8. Who may be a *principal*? 9. Who an *agent*? 10. How may an agent be appointed? 11. How are agents usually appointed, and what is the formal way of appointing them? 12. When must an agent be appointed in the latter way? 13. What is an *acknowledgment*, and when is it necessary in the case of a *power of attorney*? 14. What in some states is equivalent to such acknowledgment? 15. For what business is the form of power of attorney given designed, and how might it be adapted to other kinds of business? 16. How is an agent's authority proved where it is written? 17. How otherwise? 18. How may the principal's conduct establish the agency? 19. Give an illustration showing the strictness of the rule. 20. How is agency divided? 21. Define *general agent*. 22. What is the measure of the authority of a general agent? 23. How affected by private instructions, and why? 24. Why should the principal suffer for the fraud of his agent rather than others? 25. Give an illustration showing responsibility of principal for agent's fraudulent act. 26. Define *special agent*. 27. How far do his acts bind his principal? 28. Give illustrations. 29. What precaution should a person take, when dealing with a special agent? 30. Will private instructions vary the agent's authority to bind his principal? 31. When do the agent's representations bind his principal? 32. What are *implied powers*? 33. Give illustrations. 34. What is a person dealing with an agent bound to know? 35. How are general words construed? 36. Give an illustration. 37. What is the rule as to notice to the agent? 38. With what knowledge is the principal chargeable? 39. What is the rule as to notice to the principal?

LESSON XXX.

1. Liability of Principal. ¹The liability of the principal to third parties arises in two ways, viz.:

1. Out of the contract.
2. For wrongful act of agent.

2. Out of the Contract. ²Where a principal authorizes an agent to make a purchase in his name, and he does so, the contract is that of the principal, and he only is liable for the purchase price. ³And in general the principal must be responsible for his agent's acts, and this is the rule even though the principal was unknown at the time to the third person with whom the agent has dealings. ⁴He may have given his agent private instructions limiting his powers, but it will not avail the principal by way of relieving him from liability when the agent violates such instructions, provided the person with whom he is dealing has no knowledge of such violation. ⁵But the unauthorized act or declaration of a *special agent* will not bind his principal, though it will make him liable.

3. For Wrongful Act of Agent. ⁶When an agent acts wrongfully and negligently in the business intrusted to him, the principal is liable, as when a conductor wrongfully and negligently detains a train of cars over night in an exposed place, to the injury of a passenger. ⁷The principal is also liable for the negligence of his agent and for his failure to perform his duty, as where a servant sent by his employer to remove snow and ice from a roof, does it in such a negligent manner as to injure a person in the street below, the principal is liable for the damages; and this is so even though the agent employed a stranger to do the work for him. ⁸The principal is also responsible for the unskillfulness of his agent, as where a city, by its agents, unskillfully constructs a faulty and insufficient culvert, and thereby becomes liable for resulting damages. ⁹If the agent commits a fraud in the regular transaction of his principal's business, the principal is liable for it, though it was done without his authority. ¹⁰But where an agent commits a wilful act of trespass not within the scope of his authority, he alone is liable—he does not bind his principal. ¹¹Where a servant willfully drives his master's carriage in such a manner as to injure persons or property, he is liable, provided it was done without the consent of the principal. It is the willfulness of the act that relieves the principal.

4. Ratification. ¹²Though the act of an agent be wholly unauthorized, yet it may be ratified by the principal so as to bind him from the beginning. ¹³If an agent reports what he has done with some appearance of authority, the silence of his principal may be taken as a ratification—silence when the principal is reasonably bound to speak. ¹⁴The ratification becomes complete when the principal, with knowledge of what has been done in his name, consents to be bound by it; hence, in order to bind the principal, the ratification of the unauthorized act must be made with a full knowledge of all the material facts. Where a stranger assumes to act for another, the proof of ratification must be stronger than in the case of the unauthorized act of a regular agent. ¹⁵Ratification of

an agent's acts will be presumed unless the principal, when he has knowledge of such acts, expresses his dissent within a reasonable time.

¹⁶The principal may ratify his agent's unauthorized acts by express words, but it more commonly results from his accepting the act or receiving the benefit or proceeds of it in some form. ¹⁷He cannot, however, claim the benefit of the agency in part only and reject it as to the residue. By adopting a part of the act he becomes bound for the whole. If a principal accepts goods purchased in his name he adopts the purchase.

¹⁸Ratification is equivalent to original authority. It operates as an adoption of the act from the first.

5. Liability of Agent to Third Persons. ¹⁹The rule of law is that where an agent acts with authority in a lawful manner he is not personally liable to third persons for his acts. The principal is alone liable. ²⁰The exceptions to this rule are:

1. Where the agent acts fraudulently or unlawfully; and
2. Where he is liable under his contract.

6. Where He Acts Fraudulently or Unlawfully. ²¹It is a principle of law that no one can confer upon another authority to commit a fraud or to do an unlawful act. ²²Hence no agent can avoid liability for such wrongful act by showing that he did it for his principal and by his authority; and therefore the agent is himself responsible. ²³He is not, however, liable as an *agent*, but as a *wrong doer*.

²⁴An agent is not ordinarily liable to a third party for mere non-performance of duty or neglect, but he is liable for it to his principal.

7. Under the Contract. ²⁵An agent is liable to third parties when the form of his agreement with them or the general course of dealing, imposes such liability upon him. ²⁶This occurs in the following cases, viz: (1) where the principal is not known; (2) where the agent specially agrees to be responsible; (3) where the agent exceeds his authority; (4) where there is no responsible principal; and (5) where certain classes of agents are generally held liable.

(1) *Where the principal is not known.* ²⁷Where the principal is not known the agent is liable because the credit is given to him, or the transaction, whatever it may have been, is entered into by the other party on the faith of his responsibility. ²⁸It is immaterial whether (1) he professes to be acting for himself or (2) claims to represent some principal whom he does not disclose, the same rule of responsibility applies and the same reason for its application exists in either case. ²⁹When, however, the principal is discovered he is also liable to the third party, but this in no wise relieves the agent from his liability.

(2) ³⁰*Where the agent expressly agrees to be responsible.* As a matter of course, when the agent, being a person capable of contracting, agrees to be personally responsible, he is liable as he would be under any other lawful contract, ³¹and must see that his principal carries out the agreement made on his behalf, or fulfill it himself.

(3) ³²*Where the agent exceeds his authority.* ³³An agent is presumed to know

the extent of his authority better than any third party, and hence if he exceeds that authority, while he may not bind his principal, he does become liable himself, even though he innocently supposed his authority broad enough to cover the transaction. ³⁴ But a person dealing with an agent who has thus assumed to contract without authority is not bound to rely upon the security he may have taken, as where an agent makes a purchase of goods and gives a note on time for the purchase price, without authority, he is liable at once for the value of the goods. ³⁵ The seller is not bound to give him the same credit that he agreed to give his assumed principal.

(4) ³⁶ *Where there is no responsible principal.* Ordinarily where a person assumes to contract as an agent, without a responsible principal against whom creditors may resort, he is himself liable. ³⁷ For example, at a public meeting to arrange for the celebration of the completion of the Erie Canal three men were appointed a committee of arrangements, who afterwards employed a man to build a boat to be carried in the procession, and the members of such committee were held liable for the cost of the boat.

(5) ³⁸ *Where certain classes of agents are generally held liable.* ³⁹ The master of a ship is the agent of the owner and is known as such, yet he is liable personally upon all contracts for supplies and for repairs to the ship. Agents and factors who represent principals residing in foreign countries are held personally liable on all contracts made by them, whether the fact of their agency is mentioned in the contract or not. ⁴⁰ The presumption in such cases is that the principal being so far away the credit is given in fact to the agent. It is generally the case, also, that factors buying and selling goods for resident merchants are jointly liable with their principals.

8. **"Public Officers,** legally considered, are *public agents*, representing national, State or municipal governments. ⁴¹ The nature of his duties prescribes the measure of an officer's liability, and therefore, unlike other agents, he is not liable when he exceeds his authority, because the public are presumed to know his duties, and, therefore, also the extent of his authority. One public officer is not the agent of another, though appointed by him; hence, one public officer is not responsible for the acts of another.

⁴² Where the law gives to a public officer discretionary power he is not responsible for the manner in which he exercises it, as where a canal commissioner whose attention had been called to a supposed weakness in the canal bank, and had, upon examination, exercised his discretion in not strengthening it, he was not held liable for damages that afterwards resulted from a break at that place. ⁴³ Where, however, the discretion is confined to the manner of doing a duty which is itself imperative, then the officer will be liable for damages resulting from doing such duty in a careless or improper manner.

LESSON REVIEW.

1. In how many ways does the principal's liability to third parties arise, and what are they? 2. What is the result when the agent makes a purchase in the principal's name? 3. What is the rule as to the responsibility of the prin-

principal when he is unknown? 4. Is the principal relieved of liability where the agent violates his private instructions? 5. What is the rule in the case of an unauthorized act of a special agent? 6. Is the principal liable for his agent's wrongful acts? Give an illustration. 7. Is he liable for an agent's negligence? Give an illustration. 8. Is the principal liable for the unskillfulness of an agent? Give an illustration. 9. Within what limits is a principal responsible for the fraud of his agent? 10. Is he liable for the willful trespass of his agent? 11. Give an illustration. 12. How may the principal become bound by the unauthorized act of his agent? 13. When will his silence amount to ratification? 14. What is the condition of complete ratification? 15. What presumption exists in regard to the ratification of an agent's acts? 16. How may a principal ratify his agent's acts, and how is it usually done? 17. What is the rule in reference to partial ratification? 18. To what is ratification equivalent, and how does it operate? 19. What is the rule of law in reference to the liability of agents to third parties? 20. What are the exceptions? 21. Upon what principle of law is the first exception based? 22. Show its application. 23. In what character is the agent responsible? 24. Does this responsibility extend to mere neglect of duty? 25. State the second exception fully. 26. Under how many conditions may the liability arise, and what are they? 27. On what ground is the agent liable when the principal is not known? 28. Under what two conditions may he be considered so *unknown*? 29. Does the discovery of the principal relieve the agent from responsibility? 30. What is the second condition? 31. How should the agent protect himself? 32. Give the third condition. 33. Upon what presumption is it based? 34. Does such dealing of the agent bind the third party to the terms of the security he may have taken? Give illustration. 35. Why is he not bound by such security? 36. What is the fourth condition? 37. Give an illustration. 38. What is the fifth condition? 39. Give illustrations. 40. Upon what presumption are agents for foreign principals held personally responsible? 41. How are public officers considered in the law? 42. How does their liability differ from that of other agents and upon what theory? 43. How does the exercise of discretionary power affect the liability of a public officer? 44. How is such relief following the exercise of a discretion limited?

LESSON XXXI.

1. Relation Between Principal and Agent. 'This includes and may accordingly be divided into,

1. The liabilities and rights of the principal.
2. The duties, liabilities and rights of the agent.

2. Liabilities and Rights of the Principal. "The principal is *liable*

in general to his agent for the fulfillment of his agreement, the most important part of which usually is to pay him the compensation for his services to which he is entitled under the contract between them. ⁸ Where the agent in the course of his employment has been obliged to advance money for the payment of proper expenses or other legitimate purposes, the principal is liable for the repayment to him of such advances, and usually with interest upon the same. The principal is further liable to the agent for any damages he may have suffered, without fault on his part, in following the principal's instructions.

⁹ The principal's *rights* as against his agent are, to require an accounting by him at any time in relation to the business of the agency; to countermand his authority at pleasure, unless the agent has an interest in the business or transaction; and to be indemnified by the agent for any loss or damage he may have caused by reason of the violation of any of his obligations to his principal, as where he exceeds his authority, neglects to discharge his duties, or commits some wrongful act.

3. The Duties, Liabilities and Rights of the Agent. ¹ An agent's *duties* are determined by the nature of the business, and his agreement with his principal. ² He is bound in general to follow his instructions as long as they are within the limits of legality; but he need not do any unlawful act at his principal's bidding. ³ He owes it as a duty to his principal to exercise such diligence as the nature of the business requires; to keep him fully informed in regard to all matters relating to, or connected with, the business; to give his personal attention to it; to keep and render proper and correct accounts of his transactions; and to keep the goods or property of his principal with the same care and attention that a prudent man would bestow upon his own. ⁴ In the absence of instructions he must follow in his transactions such established customs and usages of trade as may exist in relation to the particular business in which he is engaged. ⁵ It is the duty of an agent to act for the interests of his principal with all his skill and ability, and he cannot do this where he owes a divided duty; hence in any transaction an agent cannot act for both parties, unless he is known by both parties to be so acting. ⁶ If he acts for both parties in making a contract without their knowledge, neither of them will be bound by it, and it is not necessary to show that he has gained any important advantage to avoid the contract. ⁷ He must not have any interests adverse to his principal, and hence he cannot act as both buyer and seller; nor can he permit his clerk to be a purchaser to the injury of his principal, because the acts of the clerk are the acts of the agent. ⁸ If an agent should in any way by violating his agency obligations make any gain his principal would be entitled to it, but if he suffers any loss he must himself bear it.

⁹ An agent is *liable* to his principal in general for all disobedience of his instructions and failure to perform the duties of his agency. ¹⁰ If an agent receive money with instructions from the principal to use it for a particular purpose, for example to pay a specified note, and should otherwise apply it, he would be answerable to the principal for any loss or damage he might sustain by reason of such disobedience. ¹¹ Where an agent had been authorized by usage or

particular instructions to make remittances to his principal by express, and without authority should assume to send money by mail, he would be liable for its loss. ¹⁸ An agent is also liable to his principal for any loss or damage resulting from his wrongful acts.

¹⁷ The agent's *rights* correspond to and are involved in the performance of the principal's duties to him. He has a right to compensation for his services.

¹⁸ In the usual commercial transactions it often comes in the form of commission or a percentage upon the value of the goods bought or sold, or the amount involved in the business transaction. ¹⁹ In such cases it is either fixed by agreement or determined by the usages of trade. ²⁰ In other cases, as between a lawyer and his client, the agent has a right to such compensation as his services are reasonably worth. ²¹ He is entitled also to claim indemnity for damages suffered, without his own fault, in his principal's employ, and to be repaid moneys advanced, with interest. Beyond all this, however, the agent has another right which the law allows for his protection, viz.: *the right of lien*. ²² This means that he has a right to retain in his possession all property belonging to his principal, which has come into his possession in the course of the business, until his compensation and advances have been paid. He is thus said to have a *lien* upon the property for whatever may be due him.

4. Dissolution of Agency. ²³ The agency may be terminated or dissolved in the following ways, viz.:

- | | | |
|---------------------------------------|-------|--|
| 1. By limitation. | - - - | { (1) Express. |
| | | { (2) Implied. |
| 2. By direct act of parties. | - - - | { (1) Revocation of the principal. |
| | | { (2) Renunciation of the agent. |
| 3. By change in condition of parties. | | { (1) Bankruptcy. |
| | | { (2) Incompetency. |
| | | { (3) Marriage where party is a woman. |
| | | { (4) Death. |

5. By Limitation. ²⁴ Where there is a limit to the continuance of the relation between the parties, and that limit has been reached, the agency is said to have expired by *limitation*.

²⁵ (1) *Express*. In case the power or authority is given for a certain time, its expiration will mark the termination of the agency by *express limitation*, because the date is definitely fixed.

²⁶ (2) *Implied*. The agency is terminated by *implied limitation* where the particular business for which it was constituted has been finished, as where the agent is authorized to sell a span of horses, or purchase a house and lot, such sale or purchase will terminate the agency. It is thus implied, because not being stated, it is necessarily inferred from, or grows out of the circumstances.

6. By Direct Act of the Parties. ²⁷ Either party may terminate the agency under certain restrictions.

(1) *Revocation by Principal*. ²⁸ The principal may *revoke*, that is, recall the authority given to the agent at pleasure, provided the authority remains unexe-

cuted, but the moment it is executed it becomes the principal's contract and is beyond recall, as where an agent is authorized to sell property, the principal may revoke the authority up to the time the sale is actually made, not after.²⁹ The revocation of the authority of an agent reaches through him to all his sub-agents, and terminates their authority also. ³⁰ Revocation takes effect as against the agent and his sub-agents from the time they have notice of it, and as to third parties from the time it is made known to them. ³¹ That is, the agent's authority may be absolutely revoked by notice to him from his principal, but one who has dealt with the agent has a right to assume, unless otherwise informed, that the agency continues, and the principal is bound by his agent's dealings with such person, unless notice has been brought home to him, and such notice must be actual. It will not be inferred from equivocal circumstances. ³² No special form of revocation is necessary. ³³ Where the power was given under seal it may be recalled by a writing not under seal, or orally; or it may even be implied from the acts of the principal.

³⁴ These rules in regard to the right of revocation by a principal do not apply where the agent has a personal interest in the property or business, or holds his power by way of security to himself against the principal, or as it is usually expressed, *when the agent's authority is coupled with an interest*.

(2) *Renunciation by Agent.* ³⁵ The agent may terminate his employment by *renouncing* his authority. This may be done at any time, and the agent is bound to give notice of it to his principal. ³⁶ Unless, however, the agreement provides for such renunciation at pleasure, the agent will make himself liable to his principal for any resulting damages.

7. ³⁷ By Change in Condition of Parties. (1) *Bankruptcy.* In general the *bankruptcy* of either party terminates the agency. ³⁸ If the principal becomes a bankrupt, his property passes out of his hands, and hence he would be incapable of carrying out any agreement in regard to it. ³⁹ If, however, the principal holding property in a representative capacity, that is as trustee, guardian, or executor, had in such capacity employed an agent, his bankruptcy would not operate as a revocation, because it would not affect his right or title as such trustee, guardian, or executor. ⁴⁰ But as in the case of revocation the rule that bankruptcy of the principal terminates the agency does not apply where the power is coupled with an interest.

⁴¹ The *bankruptcy* of the agent terminates his authority at once, except to do some formal act not involving the transfer of any interest, as, for example, to execute a deed of property already sold.

⁴² (2) *Incompetency.* Where the principal becomes *incompetent*, as by reason of insanity, to do any valid act, it terminates the agency; but generally this can only be determined by legal proceedings to establish the fact of such insanity.

The *incompetency* of the agent will also work a dissolution of the agency.

⁴³ This may result from insanity, or from any other cause that renders him incapable of transacting his principal's business. ⁴⁴ Where a firm acts as agent, such agency is terminated by the death or incompetency of a partner.

⁴⁵ (3) *Marriage where party is a woman.* Under the common law, where a

single woman was principal, her *marriage* dissolved the agency because, as in the case of bankruptcy, it operated to pass the title to her property out of her hands and suspended her power to contract. In like manner, under the common law, the *marriage* of the agent who was a single woman when appointed had the same effect. She might be reappointed, however, under the changed conditions, since a married woman could be an agent, though not being able to contract she could not be a principal. ⁴⁶ These last rules have been so much changed by the statutes of the different states, modifying or removing the disabilities of married women, that reference must be had in any given case to the laws of the state in which it arises.

⁴⁷ (4) *Death*. The *death* of either party, with one exception hereafter noted, terminates the agency. The authority of an agent is a personal trust and will not pass by operation of law to his heirs or personal representatives, but expires with him. ⁴⁸ But his personal representatives (i. e., his executors or administrators) must answer for all his liabilities to his principal. ⁴⁹ The death of the principal terminates the agency, because as in the case of his *bankruptcy* his property passes immediately into the hands of others, and because further, as an agent's acts must be the acts of his principal his power is gone, since a dead man can do no act. ⁵⁰ On this theory such termination of the agency has been settled by the common law as dating from the time of the principal's death, and not from the date when notice of it is given to the agent or third parties.

⁵¹ The exception referred to at the beginning of the last paragraph is a form of the one that has several times been found to apply in favor of the agent where his authority was coupled with an interest, though it is somewhat modified in this case. ⁵² If the authority must be executed in the *name* of the principal, then it ceases with his death, but if on the other hand it may be executed in the name of the agent, it will survive for his benefit.

LESSON REVIEW.

1. How may the relation between principal and agent be divided? 2. State the general liability of the principal to his agent, and the most important part of it. 3. What are some of his other liabilities? 4. Name the principal's rights. 5. How are an agent's duties determined? 6. What is he generally bound to do? 7. What degree of diligence must he exercise, and what are some of the things he must do? 8. In the absence of instruction, how are his duties determined? 9. Why may an agent not owe a divided duty? 10. What will be the result where an agent acts for both parties to a transaction without their consent? 11. Why may an agent not act as both buyer and seller? 12. What is the rule in relation to gains or losses made or suffered by an agent who violates his obligations to his principal? 13. State the general rule covering the liabilities of an agent to his principal. 14. Show by example how strictly this rule is applied. 15. Give a further illustration. 16. How does the agent's wrongful act affect his relation to his principal? 17. To what do the agent's rights correspond? 18. What is one of the common forms of an agent's compensation? 19. How is it determined? 20. How in other

cases? 21. Name another of the agent's rights. 22. What is meant by the *right of lien*? 23. In how many ways may an agency be terminated, and what are they? 24. What is meant by saying that an agency has *expired by limitation*? 25. What by *express limitation*, and why called *express*? 26. What by *implied limitation*, and why called *implied*? 27. What is the second way? 28. How and when may the principal terminate the agency? 29. How far does the principal's revocation reach? 30. When does it take effect as to the agent? As to third parties? 31. Give an explanation of what kind of notice is required? 32. What is the rule in regard to form of revocation? 33. How applied? 34. What exception is there to the principal's right of revocation? 35. How and when may the agent terminate the agency? 36. What liability may he incur? 37. What is the third way? 38. Why does bankruptcy of the principal terminate the agency? 39. Has it any effect where the principal while acting in a representative capacity has employed an agent? 40. What exception is there to the general rule? 41. What may the agent do after he becomes a bankrupt? 42. What is the second changed condition that will terminate the agency, and why may not an insane person be a principal or agent? 43. What incompetency of the agent will terminate the agency? 44. What is the effect of the death of one partner when the firm is acting as agent? 45. What is the third changed condition terminating agency, and why does it so operate? 46. How has this common law cause of dissolution of agency been modified? 47. What is the fourth changed condition? 48. What responsibility remains after the death of an agent? 49. On what grounds does the principal's death terminate the agency? 50. From what time does such termination date? 51. What exception is there to the rule? 52. How modified in its application?

LESSON XXXII.

PARTNERSHIP.

1. Related to Agency. By reference to the frontispiece it will be seen that one of the main branches subdivides as it springs from the trunk forming the special branches of *Agency* and *Partnership*. The intimate relationship between the two is thus sought to be shown. ¹While partnership from its nature has developed a large and exact body of special law, yet its fundamental law is the law of agency, out of which arises the right of one partner, as the agent of his copartners, to bind them by all contracts made in the course of the partnership business.

2. Definition. ²Partnership is the relationship resulting from an agreement between two or more persons to place their money effects, labor and skill, or some or all of them, in some enterprise or business, and divide the profits and bear the losses in certain proportions. ³Such a joint undertaking constitutes a *partnership*, or what is the same thing, a *copartnership*. ⁴The partners are sometimes referred to collectively as a *house*, but more commonly as a *firm*.

3. How Formed. ⁵Partnerships are formed, as the above definition indicates, by agreement or contract of the parties; but this agreement is often partly and sometimes wholly implied. ⁶Hence partnerships may be said to be formed by one of the following means:

1. By a written contract, { 1. under seal or
2. not under seal.
2. By an oral agreement.
3. By implication.

4. By Written Contract. ⁷In the formation of a copartnership, especially if the amount involved is large, the business complicated, or the duration of the partnership to be long, the contract should be in writing; but great care should be taken, as in the case of every other contract indeed, that the writing expresses *all of the agreement*. ⁸The written agreement is generally called *Articles of Copartnership*. It is usually executed under seal.

The following is a form for a copartnership agreement between merchants:

Form No. 19.

ARTICLES OF AGREEMENT, made the third day of March, one thousand eight hundred and eighty-seven, between Edgar M. Bond, of Troy, N. Y., of the first part, and Louis N. Chapin, of Albany, N. Y., of the second part, witnesseth as follows:

I. The parties above named have agreed to become copartners in business, and by these presents do agree to be copartners together under and by the firm name of Bond & Chapin, in the business of merchants and dealers in dry goods, at the said city of Albany, the partnership to commence on the first day of April, 1887, and to continue five years.

II. To that end and purpose the said party of the first part has contributed the sum of twenty thousand dollars in cash, and the said party of the second part has contributed the lease of the store No. 195 — street, in said city of Albany, to be occupied by them, and also his stock of goods and the good will of the business heretofore carried on by him, which are together estimated and valued by the parties at the like sum of twenty thousand dollars, the capital stock so formed to be used and employed in common between them, for the support and management of the said business to their mutual benefit and advantage.

III. At all times during the continuance of their copartnership they and each of them will give their attendance, and do their and each of their best endeavors, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit and advantage, and truly employ, buy, sell and merchandise with their joint stock and the increase thereof in the business aforesaid, and also that they shall and will at all times during the said copartnership bear, pay and discharge equally between them all rents and other expenses that may be required for the management and support of said business; and that all gains, profits and increase that shall come, grow or arise from or by means of their said business shall be equally divided, and all losses by ill commodities, bad debts or otherwise, shall be borne and paid between them equally.

IV. And it is agreed by and between the said parties that there shall be had, and kept at all times during the continuance of their copartnership, perfect, just and true books of account, wherein each of the said partners shall enter and set down, as well all money by them or either of them received, paid, laid out and expended in and about the said business, as also all goods, wares, commodities and merchandise by them or either of them bought or sold by reason or on account of the said business, and all other matters and things whatsoever to the said business and the management thereof in anywise belonging, which said books shall be used in common between the said copartners, so that either of them may have access thereto, without any interruption or hindrance of the other. And also said copartners, once in each year, or oftener if necessary, shall make, yield and render, each to the other, a true, just and perfect inventory and account of all profits and increase by them or either of them made, and of all losses by them or either of them sustained; and also all payments, receipts, disbursements, and all other things by them made, received, disbursed, acted, done or suffered in said copartnership and business; and the same accounts so made, shall and will clear, adjust, pay and deliver, each to the other, at the time, their just share of the profits, and pay and bear their just share of the expenses and losses so made as aforesaid.

V. And the said parties hereby mutually covenant and agree, to and with each other, that during the continuance of the said copartnership neither of them shall indorse any note, or otherwise become surety for any person or persons whomsoever, without the consent of the other of said copartners. And at the end or other sooner determination of their copartnership the said copartners, each to the other, shall and will make a just and final account of all things relating to their said business, and in all things truly adjust the same; and all and every, the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided equally between them.

* * * * *

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

EDGAR M. BOND. [SEAL.]
LOUIS N. CHAPIN [SEAL.]

Signed, sealed and delivered in the presence of
C. IRVING JONES, Albany, N. Y.

5. Additional Provisions. Although these articles of copartnership are supposed to constitute the agreement between two persons about to begin a mercantile business, yet with slight changes, that would readily suggest themselves, this form could be adapted to very many other kinds of business, and varied to conform to the number of partners. There are however, a number of other

general provisions, that are proper to be inserted in place of the asterisks in such form, provided the agreement of the parties includes the points thus covered. ¹⁰One of these fixes the limit of the amount to be drawn out by a partner and may be as follows:

Form No. 20.

Each of the parties may draw from the cash of the joint stock the sum of six hundred dollars quarterly, to his own use, the same to be charged in account, and neither of them shall take any further sum for his own separate use, without the consent of the other in writing; and any such further sum taken with such consent shall draw interest at the rate of six per cent. per annum, and shall be payable, together with the interest due, within twenty days after notice in writing given by the other party requiring such payment.

¹¹Another provides what particular part of the firm business shall be done or managed by the different partners. For the foregoing articles of copartnership such a provision might read as follows, and could be modified to suit other conditions or different kinds of business as occasion required:

Form No. 21.

The said party of the first part shall devote his time to the management of the books and finances of said firm, and the purchasing and importing of goods necessary to the said business; and the said party of the second part shall devote and give all his time and attention to the business of the said firm as a salesman, and generally in the care and superintendence of the store; and no debt shall be contracted for more than \$5,000, and no credit given for more than \$500 by either of said parties without the consent of the other.

¹²Still another provision relates to the dissolution of the copartnership and may be as follows:

Form No. 22.

In case of the violation of any of the foregoing covenants and obligations by either of the parties hereto, the other party may at his option dissolve this copartnership by giving the other party written notice of his election so to do, within ten days after being informed of such violation. After the expiration of the first two years of said copartnership either party may dissolve the partnership, at his election, by giving three months' previous notice in writing to the other partner of his intention so to do.

¹³Other provisions, sometimes used, stipulate for a reference of disputes to arbitration; for an offer to be made upon dissolution by any partner to buy or sell at a price he may name, which the other partner or partners must accept within a given time; for a sale at auction, of the assets, in case the parties cannot agree upon a division at the expiration of the copartnership; and also that after dissolution the retiring partner shall not carry on the same trade or business within a certain number of miles of the location of the firm business.

6. By Oral Agreement. ¹⁴But there is no necessity for a written contract in order to constitute a partnership. ¹⁵Very many partnerships are formed by oral agreement. ¹⁶The proposed partners simply meet, talk over the project and come to an understanding which constitutes the partnership agreement; but very often the terms of this agreement are vague and only cover part of the conditions. ¹⁷In such cases the law prescribes rules by which their respective rights are to be determined in all matters not included in the agreement. ¹⁸As to the

parties themselves, the law will recognize them as partners. Each will have an equal share of the profits and must bear an equal portion of the losses, no matter what differences there may have been in the value or amount of services rendered or capital contributed respectively by them. Each partner can represent and bind the firm under the general powers that will be set forth in the subsequent sections under this title; and the rights of third persons against individual partners and the firm are the same as in other cases.

7. ¹⁹By Implication. ²⁰It would amount to the same thing to say *by the acts of the parties*. ²¹That is the parties may so conduct themselves that the law will presume the existence of a copartnership between them whether they intended it or not, and hold them responsible as partners, to third parties. ²²There is however a distinction between (1) an *actual* partnership *by implication*, and (2) a partnership *by implication* as to *third parties*.

²³(1) Occasionally persons engage in business together without any agreement, under such circumstances that an actual partnership is formed; for example, a merchant in Boston requests a merchant in New Orleans to purchase and send him a certain number of bales of cotton for sale on their joint account, and the request being acted upon, the two become partners in the adventure. ²⁴But since there can be no actual partnership that does not arise out of a contract between the parties, the law in such cases implies the agreement. ²⁵And where a partnership is thus formed the law provides a code of rules to regulate the interests of the parties as has already been stated in the preceding section.

²⁶(2) Where in an actual partnership there is a contract or articles of copartnership, the terms of such agreement determine the relation of the partners between themselves, but it is their conduct, in entering into business and holding themselves out to the world as partners, that renders them liable as such to third persons. Such conduct invites a trust on the part of third persons that is equivalent to a statement by the partners of the existence of a partnership. ²⁷It follows therefore that should a person who is not a partner, or even interested in a particular partnership, so conduct himself as to make others believe him to be such partner, and thus induce them to give credit to the firm, he would thus become liable as a partner though not such in fact. ²⁸In other words the law implies a partnership between him and the other members of the firm for the benefit of third parties,

LESSON REVIEW.

1. How is partnership related to agency? 2. Define *partnership*? 3. What is a *copartnership*? 4. How are partners referred to collectively? 5. How are partnerships formed? 6. By what means? 7. When is a written agreement especially desirable and what care should be taken in drawing such agreement? 8. What is the written agreement usually called? 9. For what business is the form of articles of copartnership designed? 10. What additional provision is sometimes inserted? 11. Name a second. 12. And a third. 13. What other provisions may be inserted? 14. Is a written agreement necessary? 15. How otherwise are many partnerships formed? 16. What are some of the usual defects of the oral agreement? 17. How are they

supplied? 18. State some of the rules that the law prescribes in such cases. 19. By what other means are partnerships formed? 20. How otherwise may it be expressed? 21. Explain the use of the terms? 22. What distinction exists here in regard to the use of the expression *by implication*? 23. How may an actual partnership *by implication* arise? Give an illustration. 24. How may such a partnership be said to be the result of an agreement or contract? 25. How are the interests of the partners regulated in such a copartnership? 26. What determines the relation of the partners between themselves in case of the existence of a contract and what as to third parties? 27. What is the result where one conducts himself as a partner when he really is not? 28. For whose benefit does the implication arise?

LESSON XXXIII.

1. The Firm Name. ¹The name of the firm is usually fixed by the articles of copartnership, but this is not necessarily the case. ²The firm may bind themselves by any name they may adopt, and the name that they actually use in their business transactions will be considered their firm name. ³They may carry on the firm business in the individual name of one of the partners, or they may adopt a name that does not include the name of any of the partners. For example, the firm name in Form No. 19 might be made "Edgar M. Bond," or "Bond & Co." or "The Hudson Mercantile Co.," or any other name the parties might agree upon. ⁴There are some restrictions imposed by state statutes by which it is made unlawful among other things to use the name of one who is not interested in the firm, or to use "& Co." where it represents no one, but these cannot be considered here.

2. Duration. ⁵The duration of the copartnership is entirely a matter of agreement if the parties choose to make it so. ⁶Hence if a limit is fixed for its duration it will be presumed to last until such period has elapsed, or in case the partnership is formed for some particular enterprise, as in the preceding illustration, then its duration will be implied until the particular business for which it was formed is finished. ⁷Where no time is fixed either by agreement or implication, then the partnership will be presumed to continue at the pleasure of the parties and either one may dissolve it by notice at any moment. ⁸In the absence of such notice then, it may continue during the lives of the partners; but the law will not presume in any case its longer continuance. ⁹Hence if it be the purpose to have the copartnership business carried on after the death of a partner, this presumption must be overcome by a special provision in the partnership agreement for so continuing the business. ¹⁰The executor or administrator of the deceased partner will then succeed to his interest in the firm, and carry on the business as his representative.

3. Community of Profits. ¹¹ The most important condition of the formation of a copartnership is the *sharing of profits* by the partners. ¹² No partnership can arise unless the element of profit is present, and there is a community of such profits, and a joint adventure among the partners, and hence this sharing of profits has been laid down, as the first test in determining whether or not a partnership actually exists in any given case. But here again arises a distinction. ¹³ While it is true that every actual partner must share in the profits, it is not true that every one who shares in the profits is a partner. ¹⁴ A person does not become a partner in a business, from the mere fact that he is to receive as a compensation for his services a share of the profits, when he has no interest or property in the capital, and acts under orders—when in fact he is merely a clerk or agent. He may even have a right in consideration of money advanced by him, to control the business and dispose of the property, and yet not be a partner. ¹⁵ It will therefore be seen that this distinction may be, and often is a very difficult one to make; and the test is finally narrowed down to this, viz.: wherever a party has contracted for a share of the profits, *as profits*, so as to entitle him to an accounting and a proprietary interest in the profits, he is a partner; but when he has agreed for a remuneration in proportion to the profits, or out of the profits without any interest in the capital stock or credits, then he is not a partner.

¹⁶ Where no agreement exists governing the division of profits the presumption is that they are to be divided equally, as well as that the losses shall be shared in the same proportion; but it is a very common thing for the articles of copartnership to provide for a different division and sharing of the profits and losses. ¹⁷ Indeed, it is sometimes the case that one partner agrees to bear all the losses that may be suffered, while both or all the partners are to share the profits in whatever proportion may be agreed upon.

4. Ownership of Capital Invested. ¹⁸ Generally the partners are *joint owners* of the capital invested, and what that kind of ownership means we must now consider. ¹⁹ Where two or more persons hold an estate by the same title, having the same interest, commencing at the same time, and the same undivided possession, they are said to be *joint tenants*. The share of each is indistinguishable from that of the others, and hence each has a right to the possession of the whole. ²⁰ The most important incident of *joint tenancy* is the *right of survivorship*. ²¹ This means that the survivor or survivors take the right or interest of their deceased joint tenant which in other cases would go to his heirs. ²² For example, where three persons hold property as *joint tenants* and one of them dies, the other two own the property in equal shares; and when one of the remaining two dies, then the sole survivor owns it all. ²³ This is exactly the opposite of *tenancy in common*, that is *tenants in common* are entitled to distinct though undivided shares that go to their heirs at their decease. It has already been said that partners generally own the capital stock *jointly*: ²⁴ they are not, however, strictly speaking *joint tenants*, because (1) the right of survivorship does not exist except for a particular purpose (as we shall see when we discuss dissolution of partnership), and (2) one partner may dispose of the entire joint property, while in the case of actual *joint tenants*, one can only dispose of his own interest.

²⁵ In the form of articles of copartnership given, one partner contributes money only while the other puts in his stock of goods, lease of store, and good will of the business, and these at once become the joint property of both partners, and constitute the capital of the partnership. ²⁶ But it is not always the case that the partners are such joint owners of the capital stock, although the presumption is in all partnerships that the partners contribute towards the capital. ²⁷ It often happens, however, that the contribution of one partner consists in his labor, skill or experience in conducting some particular branch of business, while the other partner or partners furnish the money or property required in the joint undertaking. In that case it is commonly said that one puts in his skill and experience against the money or property of the other.

²⁸ Nor is it necessary when each partner contributes a portion of the actual capital that the same should become the joint property of the firm. ²⁹ In the form given, the partners, each of whom perhaps owns a span of horses, might agree to put them in for the use of the firm in addition to the other capital agreed to be contributed, though retaining their individual ownership of the animals.

5. Partners. ³⁰ As we have seen, a partnership results from or grows out of a contract, and therefore only such persons as are competent to contract can become partners. ³¹ For the same reason no one can become a partner against the wish and will of the others, because another of the necessary conditions of the contract would be wanting, viz.: *assent*. ³² Partners are of four classes and are distinguished as follows, viz.: (1) *real or ostensible*, (2) *dormant or concealed*, (3) *limited* and (4) *nominal*.

³³ (1) *The real or ostensible partner* is one who appears to the world to be and actually is a partner, and enjoys the benefits and assumes the risks of the position.

³⁴ (2) *Dormant or concealed partner.* It sometimes happens that a person invests money or capital jointly with one or more other persons in some business adventure, and at the same time keeps the fact of his connection with the enterprise a secret. This makes him a *dormant* or *concealed* partner. Of course his name does not appear in the firm name or in any other manner in their business.

³⁵ This is done to avoid the risk and responsibility of an *ostensible partner*, and so long as the concealment is perfect he escapes liability to the firm creditors.

³⁶ He is, however, in fact a *real partner*, and the moment a creditor of the firm ascertains his connection with it, he may sue and recover from him the same as from any other partner; ³⁷ and the fact that the creditor did not trust the firm on the strength of his relationship with it does not matter, for his liability to third parties is based upon the contract with his copartners.

³⁸ (3) *The limited partner* exists only in States where the statutes provide for the formation of limited partnerships. ³⁹ Such a partner, by complying with the requirements of the statute, may contribute any certain amount agreed upon to the partnership capital and his risk extends only to the loss of the sum so invested. His liability is thus *limited* and none of the debts of the partnership can be collected from him. Limited partnership is discussed in the next lesson.

⁴⁰ (4) *Nominal partner.* As we have seen, a person may make himself liable

to third parties, as a partner, when in fact he has no interest whatever in the firm. This makes him a *nominal partner*. "He places himself in that position by such conduct as may reasonably lead others to suppose he is a partner in fact, and who are thus led to trust the firm on the faith of his responsibility.

LESSON REVIEW.

1. How is the firm name usually determined? 2. Is any particular name necessary? 3. What may be used as the firm name? Give illustrations. 4. In what way has this right to adopt any name been restricted? 5. How is the duration of the partnership governed? 6. How long will it be presumed to last? 7. How long when its duration is not in any way fixed, and how may it be dissolved? 8. How long if no notice is given? 9. What is necessary in case it is the design to have the partnership continue after the death of a partner? 10. In that case who represents the deceased partner? 11. What has the *sharing of profits* to do in a partnership? 12. What test does it constitute? 13. What distinction exists in regard to it? 14. How is the distinction applied? 15. What is the final test of partnership in regard to the *sharing of profits*? 16. What is the presumption as to the division of profits where no agreement exists? 17. Must the losses be shared by the partners? 18. How do the partners usually hold the capital invested? 19. Define *joint tenants*. 20. What is the most important incident of joint tenancy? 21. What does it mean? 22. Give an illustration. 23. What is *tenancy in common*? 24. How does the *joint* ownership of partners differ from *joint tenancy*? 25. Apply the rule of *joint ownership* by way of illustration to the form given. 26. Must partners so own the capital stock? 27. Illustrate how otherwise a partnership may be formed. 28. Where both contribute toward the capital stock, must such contributions become the joint property of the partners? 29. Give an illustration. 30. Who may become a partner? 31. Can a person be compelled to become a partner? Why? 32. How are partners distinguished? 33. What constitutes a *real partner*? 34. What a *dormant partner*? 35. What is the purpose in becoming such partner? 36. What is in fact his real position and liability? 37. Upon what is his liability to third parties based? 38. Where are limited partners found? 39. What is the liability of a limited partner? 40. What constitutes a nominal partner? 41. What is the ground of his liability?

LESSON XXXIV.

1. Power of Partners. ¹Each partner is a general agent of the firm within the scope of the partnership business. He is held to be the authorized agent of his copartners by virtue of the relationship in which he stands to them.

²It has been claimed that this authority of each partner rests as much upon the

joint ownership of property as upon the theory of agency; but the power of each partner to act for and in the name of the firm is undisputed, and it is generally based upon the principle of agency.

2. Extent of this Power. ³As appears from the last section, this power is confined *strictly* within the limits of the partnership business, and where that embraces some particular branch only, a partner cannot bind his copartners in any transaction outside of their special line of business. ⁴If, for example, after forming their copartnership for mercantile business, Mr. Chapin should think there was a good chance for the firm to make money in speculating in real estate, and without his copartner's knowledge should sign the firm name to a contract for the purchase of a number of city lots, the firm would not be bound. ⁵The nature of the business limits the partner's powers to bind the firm. ⁶Being in trade, he may bind the firm by contracts of purchase and sale, and in all matters that, according to the usual course of dealing, have reference to the business transacted by the firm. Hence ⁷Mr. Chapin might buy a large amount of woollens or other goods kept and sold by them, even though he purchased much larger quantities than they needed, and with a speculative purpose, yet he could bind the firm to pay for them.

3. Acts that a Partner May Do. He may receive payment of debts; and he may compromise and discharge debts due to the firm; and this he may even do after the dissolution of the firm. ⁸One partner may begin legal proceedings in the name of the firm, and he may represent the firm in all matters arising in the course of the litigation. He may also bind the firm during its continuance by an admission of fact, declarations, or representations relating to the partnership business.

One partner may bind the firm by a misrepresentation in the purchase or sale of property. ¹⁰The innocent partner is answerable for the fraud of his copartner in all such cases, on two grounds, viz: ¹¹(1) because he must necessarily profit by any advantage that may arise from such wrong-doing, and (2) because by forming the partnership he has declared publicly his entire confidence in his partner. In general, each partner is liable for the fraud of his copartner committed in the course of the firm business, whether he gains by it or not.

¹²In the case of a partnership for a general business, each partner has the right to make, accept, or endorse negotiable paper for the firm; it is one of the incidents of the business, and it will always be presumed that it is done on the partnership account. Hence the firm will be liable for money borrowed in its name by one partner, although he should immediately appropriate it to his individual use. ¹³But if the person loaning such partner the money knew it was not to be used for partnership purposes, he could not hold the firm for the indebtedness.

4. Acts that a Partner May Not Do. Two rules have been laid down covering specific acts that a partner may not do. They are designed to protect the firm against the misappropriation of its credit or property, and may be stated as follows, viz:

¹⁶(1) A partner cannot use the property or credit of the firm for his individual

benefit; and he cannot bind the firm by giving its note or delivering its property in payment of his individual debt.

(2) A partner cannot bind the firm by a contract of suretyship or guaranty, unless it is shown that the other partner assented to the act.

¹⁸As in all cases of restricted powers of a partner, these rules do not apply where the other partners consent to the transaction or adopt it after it has been entered into. Their consent makes it their joint act; and this consent may be proved by showing that they have been accustomed to do the same thing.

5. General Limitations Upon a Partner's Power. As we have seen, the power of each partner is necessarily limited within the scope and object of the partnership business. ¹⁷It does not, therefore, include the authority to make a general assignment for the benefit of creditors, because such an act works a dissolution or suspension of the partnership, and an authority to do that cannot be implied from the relationship. But where the other partner consents to the assignment, or absconds, leaving his partner in control of the business, such assignment will be held valid.

¹⁸Although a partner cannot make a general assignment for the benefit of creditors, he may do that which will be equally fatal to the continuation of the business. That is, acting in good faith, he may, in spite of the protest of his copartners, transfer the entire effects of the firm to a creditor in payment of, or as security for, a partnership debt.

¹⁹One partner cannot bind the firm by contracts under seal, but the rule has been held not to apply where one of the partners, in the presence of the others, and with their consent, executed a lease in the firm name; nor does the rule apply so as to prevent one of the partners from executing a composition deed releasing a debt due to the firm. ²⁰The rule only applies where it is sought to charge the copartnership under the contract. It does not prevent a partner from doing any act under seal that he might do without a seal.

²¹It is a general rule that one partner has not the power to bind his firm by submitting any matter in controversy involving the partnership business to arbitration, either with or without seal; but a written submission under seal, by one, with the assent of the others, has been held valid, and in some of the states a submission, not under seal, made by one partner, is held to be binding on the others.

6. Effect of Agreements Between Partners. ²²In forming a partnership, the parties may agree upon any plan of operation they may choose. They may agree upon the duties that each shall perform, as is shown in the forms of articles of copartnership already given, and upon the consent necessary in making debts and giving credit. Between themselves these provisions are binding; but they are not so as to third parties dealing with the firm, without knowledge of their existence. ²³Partners cannot, however, limit their liability to third parties by any agreement they may make among themselves, because the public is not presumed to have notice of the actual relation existing between them, and therefore cannot be bound by it. Hence persons dealing with a firm have a right to consider the members as ordinary partners.

²⁴As between the partners these private agreements are valid, and where one partner acts contrary to any such private contract, he is liable to his copartner for the damages resulting from such breach. Referring to Form No. 19, for an illustration, ²⁵if Mr. Bond were to sell to some person on credit goods worth twelve hundred dollars, without the consent of his copartner, and the claim should prove to be uncollectible, he would be liable to Mr. Chapin for his loss. If Mr. Bond should fail to pay in his share of the capital, such failure would constitute a breach of their private agreement, and although suits between partners are not generally allowed, yet in that case Mr. Chapin could bring an action against him to compel such payment.

The remedy of the other partners against one who breaks his agreement depends upon circumstances. ²⁶When a partner engages in another business, and uses the partnership funds in carrying it on, contrary to their copartnership agreement, the other partners may, if they choose, have such new business and its profits treated as belonging to the firm.

7. Where there is No Agreement. ²⁷In the absence of any agreement the law assumes that the members of a firm are equally interested in the capital and profits of the business. Each partner is bound to devote himself to the interests of the firm, and neither can charge the other for his services in the management of the business. ²⁸Compensation for unusual or unequal services can only be allowed when provided for by the agreement between the partners. Even a surviving partner cannot charge for his services in closing up the business unless the articles of copartnership contain a provision allowing it.

Each partner has the same title to and interest in each parcel of the firm property, and neither has an exclusive right to it. Therefore, in case one sells his interest in the copartnership property ²⁹the purchaser is entitled to no specific article, but gets only his share in the surplus after the partnership accounts are settled and all just debts are paid. ³⁰Each partner has the same right to the possession of the partnership property, and therefore one cannot maintain an action to recover from the other, the exclusive possession of it. Where there is an honest disagreement among the partners, the act of a majority will bind the firm.

LESSON REVIEW.

1. How far does the agency of one partner for the firm extend?
2. Upon what ground does this agency rest?
3. How strictly is this power limited?
4. Give an illustration.
5. What limits a partner's power to bind the firm?
6. By what contracts may one partner bind the firm?
7. Give an illustration.
8. What may one partner do as to debts?
9. As to legal proceedings?
10. Is an innocent partner liable for the fraud of his co-partner?
11. If so, on what grounds?
12. When has a partner power to make negotiable paper?
13. When will a firm not be liable for money borrowed by one of the partners?
14. How many rules are there covering acts a partner may not do?
15. What are they?
16. When do these rules not apply?
17. Why cannot one partner make a general assignment?
18. What may he do that will effect the

business in the same way? 19. Can one partner bind the firm by a contract under seal? 20. When does the rule apply? 21. What is the rule as to the power of one partner to submit a matter to arbitration? 22. What agreements may partners make as to their respective powers? 23. Why cannot partners make an agreement to limit their liability to third persons? 24. What is the result of a breach of a partnership agreement by one partner? 25. Give illustration. 26. What if a partner engages in other business? 27. When is it assumed that partners are equally interested? 28. What about compensation for unusual services? 29. To what is the purchaser of a co-partnership interest entitled, and what does he get? 30. Why cannot one partner maintain an action for the exclusive possession of partnership property?

LESSON XXXV.

1. 'Limited Partnership, is a species of partnership especially formed in pursuance of a statute authorizing such, and thus having at least one feature of a corporation. 'It follows that limited partnerships are possible only in those states where special statutes have been enacted authorizing their formation.

2. Its Distinctive Feature. 'The chief feature which distinguishes a limited partnership from a general partnership, is the limited liability of one or more of the partners. In a general partnership, it has been seen, each partner is liable for all of the debts of the firm, no matter whether these debts exceed his interest in the firm property. In a limited partnership, by provision of the statutes under which they are formed, 'the liability of one or more of the partners is limited to the amount of the capital actually contributed by them. 'The names of the limited partners do not generally appear in the firm name. That is composed of those partners who are held out to the world as the real, ostensible partners. The latter are the active business partners, and their liability is unlimited.

3. Limited Partnerships, How Formed. 'The provisions of the statute relating to the formation of limited partnerships must be strictly followed, or the firm will be treated as an ordinary partnership. The statutes of those states which have provided for such partnership have a general similarity. 'The persons proposing to form such a partnership make and sign a certificate or agreement, which is properly executed and filed with the public records of the county in which the business is to be transacted. This certificate states the name of the firm and nature of its business, together with the names of the partners and the amount of capital contributed by each. In some states it is necessary to publish in a newspaper the terms of the partnership. 'During the course of the business the terms of the statute must be strictly followed if the limited partners are to rely on the limited liability allowed by the statute.

4. Dissolution of a Partnership can be had only in ⁹some legal way, for some legal cause. The conditions warranting a legal dissolution or termination of the partnership may, for convenience of discussion, be grouped under four general heads. ¹⁰A dissolution may take place:

1. By agreement of all the partners.
2. By act of one of the partners.
3. By decree of a court.
4. By operation of law.

5. "Dissolution by Agreement of all the partners is the common method of terminating a partnership. Having formed the partnership of their own choice, they are the natural instruments for terminating it, and as freely as they formed it. The consent to its termination must be on the part of all the partners. One of them can no more dissolve it by simply agreeing to its dissolution, the others not consenting, than he could form it without the consent of the others. ¹¹The agreement to dissolve the partnership may be expressed in three ways:

1. In the contract or articles of partnership.
2. By an agreement subsequently and formally entered into.
3. By an implied agreement.

6. Agreement for Dissolution in the Contract. ¹²It is usual, whenever formal articles of partnership are prepared, to insert a clause specifying the duration of the partnership. At the expiration of the specified period, the partnership is terminated and dissolved without further formality. If the partnership contract is not reduced to writing, nevertheless, the partners usually have an understanding as to how long it is to continue.

7. A Subsequent Agreement for Dissolution may be made by the partners ¹⁴when no time is fixed upon at the formation of the partnership, and if a time was then fixed it may be altered by subsequent agreement.

8. Implied Agreement for Dissolution. ¹⁵When the partnership is formed for the transaction of some particular business, there is an implied agreement, in the absence of an express agreement, that the partnership shall end when the entire business is completed. ¹⁶Upon the accomplishment of the business, a dissolution occurs without any formal act of the parties. ¹⁷And moreover the business of the partnership may have to do with some definite subject matter, as the working of a mine. If the mine were swallowed up by the sea and wholly destroyed, the partnership would end though no express agreement to that effect were made.

9. Dissolution by Act of One of the Partners. While the mere consent of one partner, without the consent of the others, will not work a dissolution, yet one partner, by affirmative act, may dissolve the partnership. ¹⁸He may do this by assigning all his interest, or by renouncing the contract in some affirmative way.

10. Dissolution by Assignment of a Partnership Interest is not uncommon. ¹⁹Dissolution is the immediate result of the assignment, ²⁰for the

remaining partners are not bound to accept the purchaser as a partner in place of the one who assigned his interest, nor is the purchaser bound to become a partner. ²¹ He is the owner of an undivided interest in the partnership property in common with the others, and can demand that the partnership affairs be immediately closed up and he be paid his purchased interest.

11. ²² Dissolution by Renunciation takes place: (1) By the partner expressly renouncing it, when no time of duration of the partnership has been agreed upon. ²³ It is called a partnership at will, and one or more of the partners may dissolve it at pleasure by express renunciation. (2) There is said to be a dissolution by tacit renunciation, ²⁴ when one partner withdraws from participation in the business and engages in other affairs, or refuses to act with his copartners, or by doing any affirmative act inconsistent with the partnership agreement. ²⁵ But if he takes either of these courses before the expiration of the period fixed for the duration of the partnership, in case a period has been agreed upon, he makes himself liable to his copartners for damages which they may suffer by his breach of contract.

12. ²⁶ Dissolution by Decree of a Court is the third general method of dissolving a partnership. ²⁷ It is the course generally resorted to by one or more partners, in case of a quarrel or disagreement, and an amicable dissolution and settlement of the affairs of the firm cannot be had.

13. Grounds For a Decree. There are certain well recognized causes for which a court of equity will decree a dissolution of a partnership. Enumerated in the order of their importance, they are, (1) ²⁸ Improper and fraudulent conduct on the part of one or more of the partners. (2) ²⁹ Such a violation of the articles of partnership as would defeat the purposes and business of the firm. (3) ³⁰ The exclusion of a partner from his just share in the management of the business of the firm. (4) ³¹ Continued quarreling between partners, rendering the successful prosecution of the business impracticable. (5) ³² Intemperance, dissipation or gross immorality of one of the partners, such as to impair the credit of the firm or defeat its operations. (6) Inability of a partner to act by reason of permanent illness, or from any cause to perform his part of the contract.

14. Dissolution by Operation of Law, was the fourth and last of the general heads under which the circumstances causing or authorizing a dissolution of a partnership were grouped. ³³ By operation of law is meant that when the facts or events which we shall proceed to mention, exist or happen, then a dissolution of the partnership legally results, without any affirmative act by either of the partners.

15. What Events Operate as a Dissolution. A partnership is immediately dissolved by operation of law: (1) ³⁴ Upon the death of a partner. (2) Upon one of the partners becoming insane or imbecile. (3) Upon the marriage of a female partner, as by the common law all her property and interests were thereby transferred to her husband, but this doctrine has been so generally abrogated by statute in nearly all States, as to do away practically with this

cause of dissolution. (4) Upon the sale of a partner's interest upon execution issued against his property. (5) Upon the bankruptcy of a partner, as there-upon his interest in the partnership is supposed to have become vested in his creditors. (6) Upon the breaking out of war between the different countries where the partners reside, and between which they carry on business. They are then alien enemies and cannot transact business or contract. (7) And finally upon the happening of any event which severs the unity of interest, which the law presumes to exist between partners.

16. ³⁵ The Results of Dissolution, pertain to the relations of the partners to each other in the first place, and secondly, to their relations jointly, and individually, to the public and especially the parties with whom they have had firm dealings.

17. The Effect upon Their Relation to Each Other, ³⁶is to make the partners tenants in common of the partnership property. The term *assets*, is the proper designation of this property, after dissolution has taken place. ³⁷ During the continuance of the partnership, they were joint tenants and the act of one bound all. As tenants in common they have only an undivided interest in the assets, and the power of one partner to bind the others has ceased. Neither partner can longer use the firm name or assets for the purpose of transacting new business. Nor can a partner control his undivided interest, except subject to the consent of the others. ³⁸ If the dissolution occurs by the death or insanity of a partner, or by the assignment of his interest, or its sale upon execution or from kindred causes, the personal representatives of the deceased or the surviving partner, or the assignee or purchaser upon the sale, becomes a tenant in common with the surviving partner, and is entitled to have the affairs of the firm wound up by the surviving partner just as though the partnership were dissolved by the consent of all the partners, and as discussed in the next paragraph but one.

18. The Effect upon Their Relations with Outside Parties is not as immediate as between the partners themselves. ³⁹ The rule is that one partner cannot by any act bind the firm, as to any new transaction, but this supposes that the person with whom the transaction occurs knows of the dissolution. It follows that notice of the dissolution should be given. ⁴⁰ It is usual to mail a circular notice to all persons with whom the firm has had dealings, and also to insert a notice of dissolution in the advertising columns of one of the local newspapers, so as to inform the general public, although ⁴¹ it is not necessary to give notice of the dissolution to those who have had no dealings with the firm. A retiring partner will not be liable if credit be given the firm after his retirement by one who has hitherto been a stranger, ⁴² unless he knowingly permitted his name to be used as though he were still a member. ⁴³ Where dissolution takes place by the death of a partner, or by one of the events which operate in law as a dissolution, no notice is necessary, as the death or event is a sufficient notice of dissolution. Where formal notice of dissolution should be given, either by mailing a circular note or publication in a newspaper, it may be in the following form:

Form No. 23.

NOTICE is hereby given that the co-partnership heretofore existing under the firm name of Martin & Bly, at Chicago, Ill., is this day dissolved. All accounts due the firm are to be paid to Myron T. Bly, and all liabilities should be presented to him for payment.

Dated, Chicago, Ill., August 16, 1887.

PRYOR F. MARTIN.

MYRON T. BLY.

19. "The Administration of the Partnership Assets, or the winding up of the affairs of the firm, devolves upon the survivors in case of the death of one of the partners. The death of a partner vests the legal title to the partnership assets in the survivors, and they become trustees ⁴⁶ to pay the firm debts with the firm property and to close up the business. They cannot use the stock of the old firm in a new business.

20. Powers of the Partners after Dissolution. We have seen that the power of one partner to bind the others in a new transaction ceases upon dissolution. No partner can impose new obligations upon the firm. ⁴⁶ The sole or only powers left after dissolution, relate to the winding up of the affairs of the firm and are sometimes termed powers in liquidation. ⁴⁷ For the purpose of liquidating the affairs of the firm and securing the individual rights of the partners in the assets, the partnership may be said to continue. ⁴⁸ When a partnership is dissolved by consent, it is customary to appoint one of the partners to collect the outstanding accounts and discharge the liabilities. In the absence of such appointment, either of the partners may collect debts, settle and adjust accounts and pay creditors. Each has a right to have the partnership assets, first applied toward the payment of the firm liabilities before any sharing or division among themselves is made. ⁴⁹ If there should be a surplus after the liabilities are discharged, then each is entitled to his share, to be estimated according to the amount of capital he contributed or his interest in the firm.

LESSON REVIEW.

1. What is a limited partnership?
2. Where are they possible?
3. What is their distinctive feature?
4. What is the limit of liability?
5. What names appear in a limited partnership?
6. What must be strictly followed in their formation?
7. What kind of a certificate do the partners sign and what is done with it?
8. What must be followed in the course of the business?
9. In what way and for what cause may a partnership be dissolved?
10. Give the four general ways in which a partnership may be dissolved.
11. What is the common method of dissolution?
12. In what three ways may an agreement to dissolve be expressed?
13. What usual provision is made regarding the duration of a partnership?
14. When may a subsequent agreement for dissolution be made?
15. When is there an implied agreement for dissolution?
16. When does it take effect?
17. Give illustration.
18. How may one partner dissolve the firm?
19. What is the result of an assignment of his interest by one partner?
20. Why does this result follow?
21. What is the interest of the purchaser and what can he demand?
22. How and when

does dissolution by express renunciation take place? 23. What is a partnership at will? 24. When is there a dissolution by tacit renunciation? 25. What is a partner's liability if he dissolves by tacit renunciation before the time fixed upon as the limit of duration of the partnership? 26. What is the third general method of dissolving a partnership? 27. When is it generally resorted to? 28. What is the first enumerated cause for which a court of equity will dissolve a partnership? 29. The second? 30. The third? 31. The fourth? 32. The fifth? 33. What is meant by the term, "Dissolution by operation of law?" 34. Name in their order the seven enumerated events which operate as a dissolution. 35. To what do the results of dissolution pertain? 36. What is the effect upon the relations of the partners to each other? 37. What is the effect of a dissolution upon the power of one partner to bind all? 38. What is the result if the dissolution occurs by death, assignment of interest, sale on execution, or kindred causes? 39. What is the rule as to the power of one partner in a new transaction? 40. How is a notice of dissolution usually given? 41. To whom is it not necessary to give notice? 42. When will a retiring partner be liable to a stranger to the firm, for a debt contracted after his retirement? 43. When is a notice of dissolution not necessary? 44. Upon whom does the administration of the partnership assets devolve, in case of the death of a partner? 45. What is the duty of the survivors? 46. What are the powers left after dissolution? 47. For what purposes may the partnership be said to continue? 48. What is customary regarding the appointment of one of the partners upon dissolution? 49. What is done with a surplus?

LESSON XXXVI.

JOINT-STOCK COMPANIES.

1. Definition. ¹Joint-stock companies are associations formed for the transaction of various kinds of business. ²They are in fact partnerships, and are so considered in law; ³but they differ from the ordinary forms of partnership in their organization. ⁴These companies were formerly more common in this country than they are at the present time. ⁵This change has resulted from the enactment of general laws by the legislatures of most or all of our states, under which corporations may be quickly and easily organized. Formerly it was necessary in the organization of every corporation to procure a charter from the legislature. ⁶This usually involved much delay, and not infrequently large expense, and rather than await the result of such special legislation, the persons interested in the proposed business or undertaking, would risk the responsibilities of partners.

2. How Formed. ⁷The joint-stock company has been usually adopted in preference to the ordinary partnership where the number of the persons interested was so large as to make it very inconvenient to conduct the business as is commonly done by copartners. ⁸It often has as complete an organization as a corporation. ⁹The stockholders forming the association enter into articles of agreement which regulate and define the rights of the *members* among themselves. ¹⁰These articles provide for the manner of forming the company; the amount of the capital stock; the number of shares and the amount of each; the manner of transferring the stock; and the election or appointment of officers and agents. They also provide for the management of the business of the company, and include all other provisions considered necessary or proper for conducting its affairs.

3. Liability of Stockholders. ¹¹Ordinarily the members or stockholders are personally liable for the debts of the company the same as copartners for the indebtedness of the firm. ¹²That is, if the assets of the company are exhausted and there are debts yet remaining unpaid, each stockholder is liable to the creditors for the full amount of such debts. ¹³When no statute provisions exist regulating the liability of members, it is determined upon the same principles, and in the same manner, as in the case of ordinary partners.

¹⁴In some states the formation of these companies and the liability of their members, is regulated by statute, and they are given certain corporate privileges. In New York a joint-stock company may sue and be sued in the name of its President or Treasurer, and the members are not individually liable until a judgment has been recovered against the company, and an execution issued thereunder has been returned unsatisfied. ¹⁵These companies are not dissolved by the death of a member, or by a sale or transfer of his stock, as is the case in an ordinary partnership. ¹⁶A joint-stock company is said to be more than a partnership, and less than a corporation — it is in fact an intermediate stage in the development of the former into the latter.

4. Business, How Conducted. ¹⁷Usually the business of the company is transacted by trustees or directors chosen for that purpose by the stockholders. ¹⁸On a dissolution these managers usually become, under the articles of agreement, trustees to convert the assets of the company into money, and distribute the same among the members. ¹⁹While the company is treated in law as a partnership, yet the shareholders have different, and in some cases greater, rights than copartners. ²⁰A stockholder may sue the company upon its contract made with him, and the rights of the parties may be adjusted without going into the company accounts.

5. Voluntary Clubs. ²¹Many voluntary clubs or associations, such as lodges of Free Masons and Odd Fellows, are in form joint-stock companies. Where such is the case they cannot be sued in that capacity, but the members may be proceeded against individually. ²²Many clubs of this kind are now regularly incorporated, the tendency being in that direction, the same as in the case of business enterprises.

LESSON REVIEW.

1. What are *joint-stock companies*?
2. How are they considered in law?
3. How do they differ from ordinary partnerships?
4. Were they formerly more common than now?
5. Why?
6. What were some of the difficulties in the way of procuring charters?
7. In what cases were joint-stock companies preferred to ordinary partnerships?
8. Had they a complete organization?
9. How was it effected?
10. For what did these articles generally provide?
11. What is the liability of stockholders?
12. Illustrate this liability?
13. By what principle is the liability of a stockholder determined in the absence of statute regulations?
14. Is the formation of these companies ever regulated by statute?
15. State the different effect upon a joint-stock company and an ordinary partnership of the death of a stockholder, or partner, or the sale of his interest?
16. What position is a joint-stock company said to occupy with reference to partnerships and corporations?
17. How is the business of these companies conducted?
18. What is the position of these managers after dissolution?
19. Have shareholders any different rights from partners?
20. Give an illustration.
21. Name some voluntary clubs that are sometimes, in form, joint-stock companies.
22. Is the tendency to incorporate such clubs?

LESSON XXXVII.

CORPORATIONS.

1. Importance and Object. Corporations have already become very numerous in this country, and they are multiplying rapidly from year to year. 'They were formerly confined largely to such business as banking, insurance, express, and railway transportation, 'but recently they are taking the place of individual enterprises in mining, manufacturing, and trading; 'and when the additional fact of the enormous capital they represent, and the power they wield, are considered, the importance of the subject is sufficiently indicated.

2. Definition. 'A corporation is said to be an *artificial person*. 'By this we are to understand that it is an association of natural persons who are considered and treated in law as forming a new and distinct body, or individual. 'These natural persons are its corporators, or stockholders, but the corporation itself is a different individual — the artificial person.

'A corporation aggregate then may be defined as a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members one artificial being, capable of transacting some kinds of business like a natural person.

3. Classes. ⁸The foregoing definition is confined to *corporations aggregate*, of which class are all commercial corporations. ⁹Besides this there is another class called *sole corporations*. ¹⁰These, as the name implies, are such as consist of a single individual who possesses corporate powers. ¹¹In England, the sovereign, the bishops of the established church, and some other functionaries, each constitutes a sole corporation. ¹²But in this country such corporations are very little known, and hence require no further consideration in this work.

4. Subdivisions. ¹³Corporations aggregate may be subdivided as follows, viz:

1. Religious, or Ecclesiastical.
2. Lay. $\left\{ \begin{array}{l} 1. \text{ Eleemosynary.} \\ 2. \text{ Civil. } \left\{ \begin{array}{l} a. \text{ Public.} \\ b. \text{ Private.} \end{array} \right. \end{array} \right.$

5. ¹⁴Religious Corporations are those formed for the purpose of managing and caring for the property of churches and congregations. ¹⁵In England they are called Ecclesiastical corporations.

6. ¹⁶Lay Corporations. These include all corporations except religious. ¹⁷They are divided, as we have seen into, (1) Eleemosynary, and (2) Civil.

1. ¹⁸*Eleemosynary Corporations* are those formed for charitable purposes, such as assisting the needy by way of alms, education, or otherwise, and caring for the sick and disabled. ¹⁹This of course includes hospitals, and certain schools and colleges.

2. ²⁰*Civil Corporations* include all those organized for purposes other than charitable, and therefore comprise all, or nearly all, business corporations. ²¹They are either (a) Public, or (b) Private.

(a) ²²*Public Corporations* are those that are created by the government for political purposes. ²³Cities and villages are familiar illustrations of this class of corporations. ²⁴They are given the power to legislate within certain limits. ²⁵They may pass laws, or *ordinances* as they are usually called, for local purposes, such as improving streets, building bridges and sewers, regulating the sale of food products and the like. ²⁶Such ordinances have the same force as statutes of the state, but the power to make such local laws is subject to the control of the state legislature.

²⁷By the statutes of most, if not all our states, counties, towns, and school districts have certain corporate attributes. ²⁸They may take and hold property, and may sue and are liable to be sued, in their corporate capacity. Thus, while they have some of the powers and privileges of corporations, they differ from them greatly in other respects. ²⁹They are therefore called *quasi corporations*, which means, *as if, or in a manner, corporations*.

(b) ³⁰*Private Corporations* are those established or founded by private enterprise; ³¹and this is true, even though the purpose and operation of such corporations partake of a public nature. ³²For example, banks, insurance companies, and railroads, doing business of a public nature, are private corporations, where the stock is held by private individuals.

7. How Created. ³³A corporation is the offspring of the state, and derives its being and powers from the law. ³⁴With few exceptions, which will be hereafter referred to, all corporations are created in one of two ways, viz: (1) *by charter*, or (2) *under general statute*.

(1) *By charter.* ³⁵Where a corporation is formed by an express act of legislature, it is said to be formed by charter. ³⁶This act of legislature is the *charter*, and it provides that certain persons whose names are embodied in it, shall constitute a corporation under some specified name, and with certain specified powers. ³⁷This charter, when once accepted and acted upon, assumes the nature of a contract between the state and the corporators; ³⁸and cannot, therefore, be impaired or altered by any subsequent act of the legislature, unless the power to alter or amend the act is reserved in the charter. ³⁹Hence such a corporation becomes actually independent of the legislature. ⁴⁰This naturally opened the way to abuses on the part of corporations, and led, in most cases, to the introduction of a clause into the charter reserving the right to amend or repeal it.

(2) ⁴¹*Under a general statute.* Recently the method of forming corporations by charter, especially those for business or manufacturing purposes, has given place almost entirely to incorporation under the statute. ⁴²This means that the legislatures of most, if not all, the states and territories have now enacted general laws providing for the formation of such corporations which may be organized by compliance with the terms of these statutes. There is a great similarity among these laws, so far as the main provisions are concerned, and though they differ somewhat in detail, they render the formation of corporations under them a comparatively simple matter free from the delays of the other method.

⁴³The exceptions to these two modes of incorporation, are the rare instances where corporations have been formed by *prescription*, which is equivalent to saying by *presumption*. ⁴⁴This means that although the corporation possesses no charter, yet it has existed and exercised corporate functions for so long a time that it is presumed to have originally had a charter, which has been lost, through the accidents incidental to such a lapse of time.

8. Powers of Corporations. ⁴⁵At common law every corporation has certain attributes which may be described as the power,

1. To have succession,
2. To sue and be sued,
3. To make and use a common seal,
4. To purchase, hold, and convey property,
5. To appoint officers and agents,
6. To make by-laws.

9. (1) The Power to Have Succession, is implied in the definition of a corporation, and is the first essential of its existence. ⁴⁶It means that the corporation continues until the term limited for its existence in the charter or statute expires. When an officer dies, or is removed, a successor is elected or

appointed, and when a stockholder sells his stock, or dies, his interests pass into the hands of some one who succeeds him. Thus, while a partnership is dissolved by the death, or bankruptcy of a member of the firm, or a sale of his interest in the business, a corporation survives all such changes within its body by means of this capacity of succession. ⁴⁷ When the term of a corporation's existence is not limited by its charter or the statute, it has perpetual succession — it is said to be immortal. ⁴⁸ If the state in granting a charter, reserves the right to alter or repeal it, the corporation does not have a right to perpetual succession, because its continued existence depends upon the will of the legislature. The rule is the same, where the general statute under which a corporation is organized, reserves the right to alter or repeal it.

10. (2) ⁴⁹ The Right to Sue and be Sued, is essential to the defense of the rights of the corporation. Without such a capacity it could not maintain its existence. ⁵⁰ It must bring its actions in its corporate name, and it must be sued under the same name.

11. (3) The Corporate Seal. The right to make, alter, and use a common seal is one of the incidental powers of a corporation. ⁵¹ Under the common law it was supposed that a corporation aggregate could not manifest its intentions through natural agencies as personal acts or oral discourse, but that this could only be done in an artificial way by the use of its seal. The custom of using a seal, as we have seen, is very ancient. It had been in use before the formation of corporations, and was simply adopted by them. ⁵² The use of a seal by corporations is only necessary now in the performance of such acts as are required by law to be done under seal; such as the conveyance of real estate. When used, the corporate seal has the same legal effect as an individual seal. For example, if it be affixed to a note, the instrument becomes a bond.

12. (4) ⁵³ The Power to Purchase and Convey Property, is limited only by the terms of the charter or statute. ⁵⁴ Where there is no such limitation, a corporation has, so far as amount is concerned, the same right to take, hold, and convey real and personal property, as a natural person.

⁵⁵ In many cases, the amount of property which a corporation may acquire, hold, and convey, is restricted by law, as well as the purposes to which it may be applied. ⁵⁶ The capacity of a religious corporation, or a railroad company, to take real estate and other property, is usually limited to the purposes of its organization. ⁵⁷ If the value of property acquired by a corporation be within the limit fixed by its charter or the statute, and afterwards increases beyond that limit, this will not affect the title of the corporation. ⁵⁸ Where a corporation exceeds its powers in making a purchase of property which it actually receives and uses or sells, it cannot interpose its want of power as a defense to a suit against it for the purchase price, or to defeat the title of its grantees. ⁵⁹ But where the corporation exceeds its powers, its contract is void so long as it remains executory.

LESSON REVIEW.

1. To what kinds of business were corporations formerly confined? 2. What change is taking place in that respect? 3. What other facts indicate the importance of the subject? 4. What is a corporation said to be? 5. What is meant by this? 6. Who are the corporators? 7. Define a *corporation aggregate*. 8. What corporations does this class include? 9. Name another class of corporations. 10. What is a *sole corporation*? 11. Give illustrations of this class of corporations? 12. Are they much known in this country? 13. What are the subdivisions of *corporations aggregate*? 14. What are religious corporations? 15. By what other name are they known? 16. What are included under *lay corporations*? 17. How are they subdivided? 18. What is an *eleemosynary corporation*? 19. Give illustrations. 20. What are *civil corporations*? 21. How are they subdivided? 22. What are *public corporations*? 23. Give illustrations. 24. Have they legislative powers? 25. What laws may they pass? 26. What force have such laws? 27. Have counties, towns, and school districts generally any corporate attributes? 28. Name some of them? 29. What are such divisions called, and what is the meaning of the term? 30. What are *private corporations*? 31. May they still be private corporations while their business is of a public nature? 32. Give illustrations. 33. What relation does a corporation bear to the state, and what dependence has it upon the law? 34. In how many and what ways are they generally formed? 35. When is a corporation said to be formed by charter? 36. What is the *charter* and what does it provide? 37. When does it assume the nature of a contract, and between what parties? 38. May it be impaired or altered by act of legislature? 39. What position did this give such a corporation? 40. To what did this lead? 41. How are business corporations now generally formed? 42. What is meant by this? 43. What are the exceptions to these modes of forming corporations? 44. Upon what presumption is the formation of a corporation *by prescription* based? 45. Give the common law powers of a corporation. 46. What is meant by *the power to have succession*? 47. When is a corporation said to be *immortal*? 48. When has a corporation not the power of perpetual succession? 49. Why is the right to sue and be sued essential? 50. In what name must a corporation sue and be sued? 51. Under the common law how was it supposed a corporation could, and could not manifest its intention? 52. When is the use of a seal by a corporation necessary? 53. How, if at all, is the right of a corporation to take and hold property, limited? 54. When not so limited, what are its rights in respect to taking and holding property? 55. Is the amount of property which a corporation can take ever restricted? 56. How is the capacity of certain corporations to take real estate generally restricted? 57. In what case may the value of real estate held by such corporations exceed the amount allowed by law without affecting their title? 58. When may a corporation not interpose its want of power to take property? 59. When is the executory contract of a corporation void?

LESSON XXXVIII.

1. By What Law Governed. ¹A corporation created in one state may make contracts in another, unless prohibited by the laws of the latter, and it may sue in any state where it has rights or interests to defend. ²Its property and all its transactions are subject to the law of the state in which it assumes to do business. ³A corporation is supposed to reside where it carries on business. If it has several places of business within the state under whose laws it was incorporated, then it has a residence at each. ⁴Strictly speaking, a corporation created in one state cannot remove into and maintain its legal existence in another, because its being depends upon the law of the state creating it, and that law as we have seen can have no force outside of the state. ⁵Corporations are, however, by the comity existing between states and nations, allowed to transact lawful business almost everywhere. ⁶There are in most states statutes providing for the transaction of business within their territory by foreign corporations.

2. Restrictions. ⁷The general rule is that corporations may sell and convey their property as freely as individuals and in the same manner. ⁸This, however, has been restricted in the case of religious corporations. ⁹They must procure an order of the court authorizing the sale and conveyance of real estate before they can make a valid transfer of the property. This restriction was first imposed by statute in the reign of Elizabeth, and has been generally recognized in this country.

¹⁰When a corporation acquires real or personal property by purchase, it acquires an absolute title; ¹¹but the rule is that where it acquires real estate under the statute for a particular purpose, the title will revert to the original owner as soon as that particular use of the ground ceases. ¹²Where a railroad takes private property for its road-bed, and afterwards ceases to use it for that purpose, the original owners of the land are entitled to it—it reverts to them.

3. (5) ¹³The Power to Choose Officers. A corporation has a right to choose its managers or directors, and appoint and pay its subordinate officers and agents. ¹⁴The charter, or general law under which the corporation is organized, naturally prescribes the mode in which the directors shall be chosen. ¹⁵In that case the election must be held at the time and place prescribed and upon the notice required. ¹⁶When the charter or general act provides for an election in the manner to be prescribed in the by-laws, these are thus made the law of the election. ¹⁷Generally each stockholder has one vote for each share of stock which he owns. ¹⁸He votes upon the stock standing in his name upon the books of the corporation, whether he holds it in his own right or as a trustee, but no one has a right to vote upon stock irregularly issued, or owned by the corporation itself, even though it stands in the name of an individual as trustee. ¹⁹This right to vote may generally be exercised by proxy; that is, the stockholder may give a written power of attorney, or as it is generally called, *a proxy to vote*, to some person, who is thereby authorized, upon filing this document with the

proper officer of the corporation, to vote for the absent stockholder. ²⁰The following is a usual form for such proxy:

Form No. 24.

KNOW ALL MEN BY THESE PRESENTS, That I, George M. Sternberg, do hereby constitute and appoint Henry S. Miller, my attorney and agent, for and in my name, place, and stead, to vote as my proxy at any election of Directors of The Rochester Land and Stock Company, Limited, according to the number of votes I should be entitled to vote if then personally present.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, at the city of Rochester, N. Y., this fourth day of January, one thousand eight hundred and eighty-seven.

GEORGE M. STERNBERG, [SEAL.]

*Sealed and delivered in
the presence of* }

TENEYCK D. SNYDER.

Rochester, N. Y.

²¹The right to vote belongs to every stockholder, and yet it does not depend exclusively upon such ownership. ²²Churches and other religious societies have no stockholders, and yet the corporators have the right to vote in an election of officers. ²³This right usually rests upon two considerations, viz: stated attendance upon divine worship in the church or society for one year, and contribution to the support of such church or society.

4. How Corporations Act. ²⁴A corporation must act through its officers, and hence the power of the stockholder is exhausted in electing the officers. ²⁵A stockholder has not usually any further concern in the transaction of the corporate business. ²⁶The corporation must act in the manner prescribed by its charter, or by the general law, and therefore if it be required, for example, to contract in some particular way, its agreement made otherwise is illegal and void.

²⁷The directors of a corporation are trustees of its property, and its stockholders may hold them liable for any bad faith in the use of its funds.

²⁸It is not necessary in making ordinary contracts, that an agent of the corporation be appointed under seal. ²⁹Such was the rule however, under the common law; but this has been so modified, that now the appointment not only need not be made in any particular manner, but it may even be inferred or proved by circumstances.

5. (6) ³⁰Power to Make By-Laws. The power to make by-laws is usually expressly given by charter or general statute, but where it is not so given, it is tacitly understood. ³¹These by-laws are the rules or laws laid down by the corporation for its own government. ³²They provide in general the methods of transacting its business, as well as for the regulation of its own internal affairs. ³³The power to make by-laws is in some cases given to the directors, and in others to the corporation. In the latter case, they are passed upon and adopted by the corporators or stockholders.

³⁴Every by-law must be consistent with the law of the land, otherwise it will be void. They must also be consistent with the charter of the corporation, and they must be reasonable and capable of enforcement.

6. Amotion and Disfranchisement. ³⁶The right of *amotion* or removal of an officer from office was formerly considered one of the incidental powers of a corporation; ³⁶but the old rule and the old decisions are not now of much importance, because corporations in this country are for the most part so organized that the officers are chosen and the corporate affairs managed as prescribed by statute. Even where this is not the case, and the officer holds for a definite term, he cannot be removed in a summary way. ³⁷The directors of a corporation are usually chosen for the term of one year. They hold for that time and may vindicate their rights in an action. ³⁸Officers like a cashier or teller of a bank, appointed for an indefinite term, may be removed at any time.

³⁹*Disfranchisement* or expulsion of a member from the corporation, is sometimes permitted. ⁴⁰It is however, a severe measure which deprives the member of his interest in the corporation, and hence the existence of the right will not be readily presumed. ⁴¹It can only be resorted to where the power is expressly given by charter, or necessarily implied from the nature of the corporation.

7. Holding Property as Trustees. ⁴²It was formerly thought that corporations could not take and hold property as trustees for the benefit of others; but the opposite doctrine now prevails, and in fact many corporations do act as trustees, and as such may be compelled by law to perform the duties of their trusts. ⁴³The only restriction upon this power is that corporations cannot take lands in trust for purposes outside the scope of their corporate purposes.

8. Power and Mode of Contracting. ⁴⁴As we have seen, the rule is that individuals have the largest liberty in contracting, and may enter into all contracts, except only such as are illegal. In the case of corporations the rule is different. ⁴⁵They can only contract within the scope of their corporate business—within the powers given to them by charter or general statute. ⁴⁶For example, a banking corporation cannot enter into a contract for the building of railroads, nor can a corporation formed for the manufacture of mowing machines enter into a contract to build steamboats.

Corporations were formerly confined, as we have seen, to one mode of contracting. ⁴⁷Now, however, where neither the law nor its charter prescribes the manner in which a corporation must contract, it may bind itself in any of the ways by which it can manifest its assent. ⁴⁸This assent may even be inferred or implied, as in the case of an individual. It may become bound on an implied contract. ⁴⁹Upon this ground a bank is bound by the acts of its acknowledged officers and agents in the ordinary transaction of its business, ⁵⁰as where its cashier certifies a check, when the drawer has no funds in the bank.

LESSON REVIEW.

1. What rights does a corporation formed in one state have in another?
2. To what law are its transactions and property subject?
3. Where is a corporation supposed to reside?
4. May a corporation, strictly speaking, remove to another state? Why?
5. On what ground are corporations permitted to transact business almost anywhere?
6. Are there generally state

statutes providing for this? 7. What is the general rule in regard to the sale and conveyance of their property by corporations? 8. In what case has the rule been restricted? 9. What authority must a religious corporation have for the sale of its real estate? 10. What title does a corporation acquire when it purchases property? 11. What title when it acquires it under the statute? 12. Give an illustration. 13. What is the fifth common law power of a corporation? 14. What is the mode of choosing directors? 15. Must these provisions be strictly followed? 16. In what case are the by-laws made the law of the election? 17. How many votes does a stockholder generally have? 18. What determines the amount of stock upon which he may vote? 19. May this right to vote be exercised otherwise than personally? How? 20. Give the general form of a *proxy to vote*. 21. Is the right to vote confined to stockholders? 22. Give illustrations. 23. Upon what does the right to vote at an election of officers for a religious corporation usually depend? 24. Through what medium must a corporation act, and what bearing has this upon the rights of a stockholder? 25. How is the right of a stockholder in the management of the corporate affairs usually limited? 26. In what manner must a corporation act? 27. How do the directors hold the corporate property, and what responsibility does this create? 28. Must an agent of a corporation be appointed under seal to make ordinary contracts? 29. To what extent has the old rule been modified? 30. What is the sixth common law power of corporations? 31. What are *by-laws*? 32. For what in general do they provide? 33. To whom is the power to make by-laws given? 34. With what must every by-law be consistent? 35. What is *amotion*? 36. Why is this right not of much importance now? 37. For how long are the directors of a corporation usually chosen? 38. What officers may be removed at any time? 39. What is *disfranchisement*? 40. Why is it a severe measure? 41. In what cases may it be exercised? 42. May corporations take and hold property as trustees? 43. What restriction is there upon this power? 44. Restate the rule regarding the liberty of individuals in contracting? 45. How does the rule differ in the case of corporations? 46. Give an illustration. 47. What is the present rule as to the methods by which a corporation may bind itself? 48. May their assent be inferred? 49. Upon what ground may a bank be bound by the acts of its officers in ordinary transactions? 50. Give an illustration.

LESSON XXXIX.

1. Rights of Corporators. 'A person who signs the subscription list agreeing to take stock in a corporation about to be formed, is bound by his contract. 'The advantage or interest thereby secured to him is a valid consideration, and his agreement to take a certain number of shares implies a promise to pay for them.

³ A corporation having the right to declare stock forfeited for a failure of the holder to pay installments as they become due, need not exercise that right, ⁴ but may proceed by action against the holder to recover the installment due. ⁵ If however, the stock be declared forfeited, the right of action is gone.

2. Issue of Stock. ⁶ The money or property subscribed and paid in or turned over to the corporation constitutes its capital or *capital stock*. ⁷ Each subscriber's interest in this capital stock is represented by the proportion which his subscription bears to the whole. ⁸ This capital stock is divided into *shares* of a specified value, and a certificate or certificates are issued to each stockholder representing the number of shares, or in other words, the amount of stock to which he is entitled. ⁹ For example, the capital stock of the Eastman Dry Plate and Film Company is three hundred thousand dollars, divided into three thousand shares, of the par value of one hundred dollars each. Now if Rollin Steward had subscribed ten thousand dollars, he would be entitled to one hundred shares of stock. The following would be a proper form of certificate for the company to issue to him.

Form No. 25.

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK.		
No. 10.	THE EASTMAN	100 Shares.
DRY PLATE AND FILM COMPANY.		
Capital, \$300,000.		Shares, \$100 each.
<p><i>THIS IS TO CERTIFY, That Rollin Steward is entitled to one hundred shares of the Capital Stock of THE EASTMAN DRY PLATE AND FILM COMPANY, of Rochester, N. Y., transferable only on the books of the Company, in accordance with the By-Laws thereof, in person or by attorney, on the surrender of this Certificate.</i></p> <div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;"> <p>SEAL.</p> </div> <div style="text-align: center;"> <p>WITNESS, the Seal of the Company and the signatures of its President and Treasurer.</p> <p>Rochester, N. Y., December 10, 1884.</p> </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 45%;"> <p>HENRY A. STRONG, <i>President.</i></p> </div> <div style="width: 45%;"> <p>GEORGE EASTMAN, <i>Treasurer.</i></p> </div> </div>		

¹⁰ Or if he chose he might have the amount divided and issued to him in several certificates.

¹¹ The stock is issued as soon as it is placed upon the books of the corporation in the name of the subscriber. ¹² Simply delivering the certificate, or *scrip* as it is sometimes called, is a mere matter of form — it is not required to perfect the subscriber's title. ¹³ In declaring dividends, corporations are governed by their books in determining to whom it is payable. When a dividend is declared payable in general terms, it is payable to each stockholder. ¹⁴ The scrip is evidence only of title — it is not the title itself — hence the identity of any given number of shares is not changed by the surrender of the certificates, and the issuing of new ones in another name.

3. Transfer of Stock. ¹⁵ The shares of stock are personal property, the same as a promissory note or a horse, and hence the owner may sell and transfer

them at his pleasure. ¹⁶ But since the certificate is only evidence of the owner's title, this transfer must be made upon the books of the corporation. ¹⁷ In order to do this, the seller writes across the back of the certificate, or scrip, a brief bill of sale and power of attorney, authorizing the transfer to the buyer. ¹⁸ Suppose Mr. Steward sells his stock represented by the certificate shown in the last preceding form, to Nelson Stevens, he would, before delivering it, make thereon substantially the following indorsement:

Form No. 26.

FOR VALUE RECEIVED, I hereby, sell, assign, and transfer unto Nelson Stevens, one hundred shares of the capital stock of the Eastman Dry Plate and Film Company, represented by the within certificate, and do hereby irrevocably constitute and appoint George Eastman my attorney to transfer the said stock on the books of the within named company, with full power of substitution in the premises.

Dated Oct. 5, 1887.

ROLLIN STEWARD:

In presence of

WARREN JONES, Rochester, N. Y.

The buyer presents the certificate thus indorsed, to the proper officer of the corporation — usually the Secretary — who thereupon cancels and preserves it for future reference, and issues another certificate, or certificates, in its place, to the new owner of the stock, after making the proper entries on his book showing the transfer.

¹⁹ The shares of stock may be transferred to the corporation itself, when it is not prohibited by law from making the purchase.

4. Liabilities. A corporation is bound by the law of the land, and is thus held to certain legal duties and liabilities, like a natural person.

²⁰ A corporation is not capable of committing a crime, like a felony, and cannot be arrested and punished as a criminal. It may, however, be guilty of wrongful acts, such as the conversion of property; ²¹ and it may be indicted, and convicted of a misdemeanor, and punished by a fine.

²² Corporations are liable civilly, for damages, such as those arising out of trespass, or occasioned by their negligence, the same as an individual. ²³ The general rule is that they are liable for the negligence and unskillfulness of their agents when acting within the scope of their corporate powers, but not where the acts are outside of such powers.

²⁴ Corporations, like individuals, are liable to taxation at the places of their residence.

5. Liability of Stockholders. ²⁵ Under the common law the members of a private corporation were not liable for corporate debts or obligations. If the corporation became bankrupt, they would of course lose all they had invested in its stock, but farther than that they incurred no liability. ²⁶ This rule of liability remains in force wherever it has not been modified by special charter or statute provisions. In many of the states however, such modifications have been made, in some cases making a stockholder individually liable for all the debts of the corporation, the same as a partner is responsible for the firm debts.

²⁷ Usually, however, this liability of a stockholder is confined to an amount equivalent to his stock. ²⁸ This rule applies to most banking institutions organized under authority of state legislatures, and also to National Banks. ²⁹ For example, a person holding five thousand dollars worth of stock, upon the insolvency of the corporation, not only loses the stock, but he is in addition to that personally liable for the corporate debts to an equal amount.

6. Dissolution. There are several ways in which corporations may be dissolved. The following are the ordinary methods, though they are not all applicable, as we shall see, to every corporation. ³⁰ They are (1) by limitation, (2) by act of the legislature, (3) by surrender of their rights to the state or government, and (4) by forfeiture of franchise.

1. *By Limitation.* ³¹ This of course, applies only to corporations that are incorporated for a specified time, as are most of those more recently organized for commercial purposes. The time of the duration of such a corporation is limited by its charter, or the general statute, and in either case, when that time has elapsed it is dissolved by limitation.

2. *By Act of the Legislature.* ³² Public corporations, such as towns, counties, villages and cities, created for governmental purposes, may be modified or dissolved at any time by the same power that created them, that is, by the legislature. ³³ But such dissolution cannot be made to destroy or abridge the rights of third parties against the corporation, or their interest in its property.

³⁴ Private corporations, however, as has been said, are considered in the nature of contracts between the governing power and the incorporators; and hence, unless the authority has been expressly reserved in the charter of a corporation or the general law under which it was incorporated, the legislature is powerless to pass an act dissolving it.

3. *By Surrender of their Rights to the State or Government.* Any private corporation may be dissolved by surrendering its franchise, that is, the rights and privileges possessed by it, to the state or government, ³⁵ but such dissolution will not be complete until the state or government has formally accepted the surrender.

4. *By Forfeiture of Franchise.* Corporations may forfeit all their rights and privileges by a wrong use of them, called *misuser*, or by a failure to use them, called *nonuser*, and either may result in dissolution. There is always a question in each particular case as to what degree of abuse will result in forfeiture, and this as well as the failure to use its franchise, must be determined by a court of law before the corporation will be actually dissolved.

7. Effect of Dissolution. ³⁷ The general practice now is, in case of the dissolution of a corporation, for the court to appoint a person called a *receiver*, to wind up its affairs. ³⁸ It is his duty to take charge of all the corporate property, to dispose of it, and devote the proceeds, after paying expenses of the receivership, to the satisfaction of the debts of the corporation, and if any balance remain, to divide it ratably among the stockholders.

LESSON REVIEW.

1. Is a person bound by his subscription to the stock of a corporation about to be formed? 2. What is the consideration? 3. Must a corporation exercise its power to declare stock forfeited for non-payment of an installment? 4. How otherwise may it proceed? 5. How may the right of action be lost? 6. What constitutes the *capital stock* of a corporation? 7. What is each subscriber's interest in the capital stock? 8. How is the capital stock divided and how is it represented? 9. Give an illustration? 10. Could the stock have been issued in more than one certificate? 11. When is the stock issued? 12. What are the certificates of stock sometimes called? 13. How is it determined to whom a dividend is payable? 14. Why is not the identity of any given number of shares of stock destroyed by surrendering the certificate and taking another in a different name? 15. Under what division of property are shares of stock in a corporation classed, and what is the result in regard to selling? 16. Where must the transfer be made? 17. What steps must be taken in order to effect such transfer? 18. Give an illustration. 19. When may the shares of stock be transferred to the corporation? 20. May a corporation be guilty of a felony? 21. How may it be punished for a misdemeanor? 22. Name some cases in which corporations are liable civilly for damages? 23. What is the general rule in regard to their liability for the negligence and unskillfulness of servants? 24. Are corporations liable to taxation? 25. Were members personally liable under the common law for corporate debts? 26. In what cases does this rule remain in force? 27. How has this rule been generally modified? 28. To what institutions does the modified rule apply? 29. Give an illustration of this liability? 30. What are the ordinary methods of dissolution of corporations? 31. To what corporations does the method of dissolution *by limitation* apply, and what is meant by it? 32. How may *public corporations* be dissolved? 33. What limitation is there upon this method? 34. To what *private corporations* is this method of dissolution confined? 35. What is the third method of dissolution? 36. What is necessary to complete the dissolution by this method? 37. What is the modern practice of the court in case of dissolution of a corporation? 38. What is the *receiver's* duty?

LESSON XL.

GUARANTY AND SURETYSHIP.

1. Definition. 'The terms *guaranty* and *suretyship* are distinguished in law by a slight difference in meaning; but they are popularly and sometimes in legal writings used in the same sense. This distinction is confusing, and for the purposes of this work may be properly ignored. 'We shall therefore consider both as falling under the same definition. What, then, is a *guaranty*? 'It is a contract whereby one person engages to be answerable for the debt or default of another person. 'This, therefore, falls within the scope of the statute of frauds (p. 35, sec. 7).

2. Implications, Parties. 'A guaranty being a contract, it follows that it must have the necessary conditions of a contract (p. 16, sec. 12). 'The definition implies the existence of some *principal* contract to which the contract of guaranty is *collateral*. 'That is, A owes B, or is under obligation to perform some duty for him; this constitutes the *principal contract*. C agrees with B that he will be responsible or answer for A's debt or his failure to perform his duty; this is the *collateral contract*,—the guaranty. 'It is evident then that there must be at least three parties to every guaranty, viz.: (1) the *principal debtor*, or the person who has a duty to perform, (2) the *creditor*, or the person for whose benefit the duty is to be performed, and (3), the *guarantor* or *surety*.

3. Illustrations. Guaranty is a very common form of contract. 'In its broadest sense it includes all such business engagements as indorsements of negotiable paper, agreements to be responsible for the payment of rent, and all bonds given for the faithful performance of duty by persons in positions of trust, as clerks in banks, and financial agents of business houses, treasurers of corporations, and many public officers. It will be seen that the following bond conforms to the requirements of the contract of guaranty.

Form No. 27.

KNOW ALL MEN by these presents that I, Maurice H. Merriman, of the city of Rochester, county of Monroe and State of New York, am held and firmly bound unto Anson B. Rogers, of the town of Groton, county of Tompkins and State of New York, in the sum of five thousand dollars, good and lawful money of the United States, to be paid to the said Anson B. Rogers, his executors, administrators and assigns, for which payment well and truly to be made for value received, I hereby bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents.

Scaled with my seal, and dated the second day of November, 1887.

Whereas, the above named Anson B. Rogers has employed Harry K. Elston as a clerk or salesman in his store,

NOW, THEREFORE, THE CONDITION of this obligation is such that if the said Harry K. Elston

shall well and faithfully discharge his duties as such clerk or salesman and when requested so to do shall also account for and pay over and deliver all moneys and property and other things which may come into his possession or under his control therein, then this obligation is to be void; otherwise to remain in full force and effect.

MAURICE H. MERRIMAN. [SEAL.]

Signed, sealed, and delivered }
in presence of

HENRY N. KIMPLE.

West Groton, N. Y.

¹⁰ We have here the three parties, viz.: Elston, the principal debtor, or the party under obligation to perform some duty; Rogers, the *creditor*, or the party for whom the duty is to be performed; and Merriman, the *guarantor* or *surety*.

¹¹ We have also the *principal contract* referred to in the bond, which is the agreement between Rogers and Elston for the faithful personal services of the latter; and the *collateral contract* which is the agreement between Merriman and Rogers, that is the bond itself.

4. Consideration. ¹² As we have seen, a guaranty is a contract; and hence must be supported by a consideration. ¹³ When the *guaranty* — the *collateral contract* — is made at the same time as the principal contract and constitutes the essential ground upon which the credit is given to the principal debtor, the same consideration will support both, that is, the consideration moving between the principal debtor and the creditor. ¹⁴ But in case the guaranty is made subsequent to the creation of the debt or obligation which it is to secure, then it must be supported by a new consideration.

5. Consideration, How Expressed. ¹⁵ By the English courts, and in most of our States, it is held that the consideration in contracts of this kind must be expressed. ¹⁶ But it is not necessary to state the nature or the exact amount of the consideration. ¹⁷ The words "for value received" sufficiently express the consideration, and in every contract of guaranty it is safest to use those or similar words, unless the consideration is more fully expressed. ¹⁸ Very often in such cases what is known as a *nominal consideration* is recited, that is some small sum, usually one dollar. In that case it is generally written, "In consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby guarantee," etc.

6. ¹⁹A Continuing Guaranty, is one given for the purpose of securing payment or performance of successive debts or duties. For example, Burnett F. Robertson writes and delivers to Bond & Chapin the following:

²⁰ *Form No. 28.*

FOR value received, I hereby guarantee payment of the purchase price of all goods that may hereafter be sold to Warner C. Allen by Bond & Chapin, upon the usual terms of credit to the amount of five thousand dollars, for which payment this is designed as a continuing security.

August 17, 1887.

BURNETT F. ROBERTSON.

This is a continuing guaranty. ²¹ It will not be exhausted by the first purchase or series of purchases Allen may make amounting to the sum named in the

GUARANTY AND SURETYSHIP.

ment. He may pay his indebtedness, or a part of it, and buy other goods, the guaranty will continue and cover all his obligations within the limit named until it is extinguished.

²² It has often been a question of great difficulty to determine whether or not a guaranty was continuing, and hence, one that has resulted in much litigation.

²³ In using the foregoing form no doubt could arise because the intention is distinctly stated, and it is always safest where such is the purpose to make it plainly appear by the instrument itself.

7. Scope and Extent of the Contract. ²⁴ The terms of the contract determine the liability of the guarantor. ²⁵ For example, Robertson would not be responsible in any event for more than the sum named in his agreement, and he would not be liable to any other firm or person into whose hands the guaranty might come; where a guaranty is given upon conditions, it is not binding until such conditions are complied with, as where one guarantees payment of the purchase price of goods to be sold upon a specified credit, he will not be liable unless that credit be given.

²⁶ A guaranty which is by its terms absolute binds the guarantor without any notice of acceptance, or of action taken under it. ²⁷ If, on the other hand, it should be in the form of an offer or proposition, it must be accepted or it will not become a contract.

8. Relation Between the Principal and Collateral Contract. ²⁸ It is a general rule that the collateral partakes of the nature of the principal contract, though this is subject to much modification.

²⁹ A surety is not bound by his guaranty of an illegal contract where such illegality appears on the face of it, as where one guarantees a usurious loan.

³⁰ But, on the other hand, where for example a certificate of deposit is void only on account of matters not appearing on its face, and the holder transfers it and guarantees its payment to an honest purchaser, the guaranty is valid.

9. Guaranty of Payment. This form of the contract is very much used. ³¹ By it the guarantor engages unconditionally that the note or bond shall be paid. The following is a proper form for the guaranty of payment of a note:

³² *Form No. 29.*

For value received, I hereby guarantee the payment of the within note.

DAVID LOWE.

³³ If two or more parties join in the guaranty, or the instrument guaranteed is some other kind of security, as a bond, the form must be varied accordingly.

³⁴ Where payment has been absolutely guaranteed, as in the above form, the holder of the note need not generally demand payment of the maker and, in case of refusal, notify the guarantor. If the note be not paid at maturity, it is the guarantor's duty to do so without delay. ³⁵ In some States, however, the guarantor will be discharged when he sustains loss for the want of regular notice, that is, the notice that should always and in some instances must be given to guarantors and sureties of the default of the principal debtor. ³⁶ In the case of

indorsers, the time within which notice of nonpayment must be sent is fixed by law (p. 102, sec. 8); but sureties and guarantors in general should be notified within a reasonable time, that is, as soon as possible under the circumstances.

10. Guaranty of Collection. A comparatively slight change in the last form makes it a guaranty of collection.

³⁷ *Form No. 30.*

For value received, I hereby guarantee the collection of the within note.

DAVID LOWE.

These two forms of guaranty differ considerably in their legal effect. ³⁸ The former, as we have seen, is an agreement that the maker of the note will pay it when due, and in case of his default, then that the guarantor will himself pay it. In the latter, however, the guarantor agrees to pay the note in case the holder cannot collect the amount due from the maker. ³⁹ This places upon the creditor the necessity of first showing his inability to collect. ⁴⁰ He cannot do this by merely making a demand and accepting as conclusive the debtor's refusal to pay or his statement of inability to do so. ⁴¹ He must, as a rule, sue the debtor, and attempt to enforce payment by the regular legal means. A judgment against him, and the return of an execution thereon unsatisfied, is usually held to be sufficient evidence of inability to collect from the debtor, and upon which, to compel payment from the guarantor. ⁴² The creditor must not unnecessarily delay proceedings against the debtor, for due diligence in this is often a condition precedent to the liability of the guarantor, ⁴³ Having thus exhausted his remedy against the debtor, he may proceed to collect from the surety, and as the guaranty of collection implies an action to enforce collection, the creditor may recover from his guarantor the costs of such suit against the debtor in addition to the amount due on the note or other security.

⁴⁴ But a suit is not always though generally necessary. For example, if the maker of an unindorsed but guaranteed note, after giving the note and before its maturity, removes from the State, leaving no property that can be reached by legal process, the holder may, upon non-payment, proceed at once to collect from the guarantor. Such would not be the case, however, if the maker had lived in another State when the note was made.

⁴⁵ Guaranties in these words: "I warrant this note good," "I guarantee that the within note is good," and like expressions, are in effect guarantees of collection. ⁴⁶ The holder must show that the note is not good before he can require the guarantor to pay.

LESSON REVIEW.

1. Are *guaranty* and *suretyship* ever distinguished from each other in meaning? 2. How are they treated here? 3. Define *guaranty*. 4. What relationship does it bear to the Statute of Frauds? 5. Is a guaranty a contract, and what follows as to its conditions? 6. What two contracts does the definition imply? 7. Give an illustration. 8. Name the parties to a contract of guaranty. 9. What are some of the usual business engagements

included under *guaranty*? 10. Name the parties to the bond given in the text, and their legal designations. 11. How are the two contracts represented in this instance? 12. Why must a guaranty be supported by a consideration? 13. When is the same consideration sufficient to support both the principal and the collateral contract? 14. In what cases must the guaranty be founded upon a new consideration? 15. Must the consideration generally be expressed? 16. Must the nature and amount of the consideration be expressed? 17. What is a sufficient expression? 18. What is a nominal consideration, and how may it be expressed? 19. What is a *continuing guaranty*? 20. Give a form of continuing guaranty. 21. What dealings would this cover? 22. What difficulty has arisen in regard to such guaranties? 23. How should this be avoided? 24. What determines the guarantor's liability? 25. Give an illustration. 26. What form of guaranty binds the guarantor without notice of acceptance? 27. What form requires such notice to make it binding? 28. What is the rule in regard to the nature of the principal and collateral contracts? 29. When is a surety not bound by his guaranty of an illegal contract, and how illustrated? 30. Give an illustration, showing application of a contrary rule? 31. What is a *guaranty of payment*? 32. Give a form for such guaranty. 33. Vary this form to make it applicable to a bond guaranteed by two persons. 34. Must the holder demand payment of the maker before he can compel the surety under such a guaranty to pay? 35. What rule prevails in some States regarding notice to the guarantor of the principal's default? 36. How does the time within which such notice must be given differ in the cases of indorsers and other sureties? 37. Give a form of *guaranty of collection*, and state how it differs from the last preceding form? 38. How do these forms differ in legal effect? 39. What necessity does the latter form of guaranty place upon the creditor? 40. Is a demand and refusal sufficient to establish this fact? 41. What must he generally do to prove his inability to collect? 42. May the creditor delay proceedings against the debtor indefinitely? Why? 43. What beside the original debt may the creditor recover from the guarantor? 44. When is a suit by the creditor against the debtor not necessary in order to charge the surety? 45. What is the legal effect of using these and similar words: "I warrant this note good"? 46. What must the holder show before he can require the guarantor to pay?

LESSON XLI.

1. Creditor's Rights Against the Guarantor or Surety. As we have seen, these rights are confined to the terms of the guaranty. 'The creditor can do nothing until the principal debtor is *in default*, and even then the surety is not liable if anything remains to be done' by the creditor under the terms of

guaranty. ²To illustrate (p. 168, f. 27), Rogers could have no claim under the bond against Merriman as surety for money or property in the hands of his clerk, Elston, until he had required him "to account for, and pay over and deliver" the same to him. He must fulfill all the conditions of the contract.

2. Surety's Rights Against the Creditor. ³The most important of these, though not strictly a common law right, is that of *subrogation*. ⁴A surety who pays the debt of his principal is entitled to all the means which the creditor possesses to enforce payment from the debtor. He is entitled to stand in the place of this creditor and have all his securities transferred to him, with the right to enforce them; ⁵and this is so, even though he did not know of the existence of such securities when he bound himself by his guaranty. In legal language he is entitled to be *subrogated* to all the rights of the creditor. ⁶The creditor in taking security does so not only for himself but for the indemnity of his surety. ⁷The rule is applied in favor of an indorser who is compelled to pay the maker's note. He may take an assignment of the judgment procured by the holder upon the note, after he has paid him the amount of the same, and enforce it against the maker.

⁸It is also the right of a surety who has pledged his property with that of the principal debtor, to have that belonging to such debtor first sold and applied, and he may require the creditor to do this. The proceeds of the sale of the principal debtor's property is the primary fund for the payment of the debt.

3. Surety's Rights Against the Principal Debtor. ⁹So long as the principal debtor is not in default, the surety has no rights against him, by reason of their relationship. ¹⁰The moment, however, that the default occurs, the surety may discharge the debt, and besides being subrogated to the rights of the creditor in regard to securities held by him, he may proceed at once to collect from the principal. ¹¹And he may recover not only the amount of the debt and interest, but all costs he may have been compelled to pay.

4. Surety, How Discharged from Liability. ¹²There are several ways in which a surety or guarantor may be discharged from liability under his contract. The most important are as follows:

1. Expiration of time.
2. Notice from the guarantor.
3. Alteration of the agreement.
4. Giving time to the principal.
5. Fraud practiced upon the guarantor.

5. (1) Expiration of Time. ¹³A guaranty is often given for a definite time as six months or one year, and in that case it is extinguished by the expiration of the time specified. ¹⁴This of course does not release the surety from liability under his contract for any debt or default of his principal, created or suffered during the time limited for the continuance of the guaranty, but he cannot be bound by any subsequent transactions.

6. (2) Notice from the Guarantor. ¹⁵ When the guaranty is given for an unlimited time, it may be terminated by notice to the creditor from the guarantor, with the same results as those following extinguishment by lapse of time. ¹⁶ The two methods differ only in this, that while in the former the limit is fixed by the terms of the contract, in the latter the guarantor determines the time of its expiration as he chooses.

7. (3) Alteration of the Agreement. ¹⁷ This will discharge the surety when made without his knowledge or consent. For example, the erasure or interlineation of any words altering the legal effect of the instrument, that is the primary contract, will discharge the surety. ¹⁸ The effect of such an alteration is to create a new and different agreement from the one which the surety had guaranteed. Such alterations, in order to bind the surety, must be made, not only with his consent, but in writing, as in all other written agreements.

8. (4) Giving Time to the Principal. ¹⁹ The rule is well settled that where the creditor, without the surety's consent, extends the term of credit by a valid agreement with the debtor, the transaction works a discharge of the surety. Extending the time of payment in one way or another is so very common in business transactions that it becomes important to know what kind of an agreement for that purpose will discharge a surety. ²⁰ We have stated that it must be a *valid* agreement, and hence a mere promise to enlarge the time of payment does not discharge the surety. The reason is that a naked promise is not binding, and it would not prevent the creditor from suing the debtor, or from accepting payment from the surety and vesting in him all his rights and remedies. ²¹ And for the same reason mere delay on the part of the creditor, which results in giving additional time to the debtor, will not generally discharge the surety; ²² but where the creditor is requested by the surety to proceed and collect of the principal debtor, his delay will discharge the surety, provided such delay results in the loss of the claim. ²³ Taking the note or draft of another person as collateral security for the payment of the original debt does not suspend action upon it, and hence the surety is not discharged. ²⁴ For example (p. 169, f. 28), suppose Allen becomes indebted to Bond & Chapin in the sum of four thousand dollars, and being unable to pay it when due, he turns over to them as collateral security, in addition to the guaranty which they hold, the note of some third party for that amount, this would not release Robertson

In order to operate as a discharge of the surety the agreement must be one that binds the creditor to an extension of the time of payment. ²⁵ In other words, it must be such that it will prevent him from proceeding against the principal debtor to enforce collection of the debt, and which therefore prevents the surety from asserting his right to pay the creditor and sue the debtor upon the claim. An extension of the time of payment by taking a new security for the debt, payable at a future day, will discharge the surety. ²⁶ For example, if Bond & Chapin, instead of taking collateral security as in the last illustration, were to accept Allen's note for four thousand dollars, due at any future date, Robertson would be discharged. Taking the debtor's check, payable at a future day, has the same effect.

²⁷ Of course, where the surety consents to the new arrangement, he will not be relieved from liability.

9. (5) Fraud Practiced upon the Guarantor. ²⁸ Any fraud or imposition practiced by the creditor himself, or by the debtor with the creditor's consent, which induces the surety to enter into the contract of guaranty or increases his liability under it will release him from his obligation. It is also true that if the principal contract is fraudulent, and can be avoided on that ground, this will avail the surety as an effectual defense in an action on his guaranty.

10. Rights Between Sureties. ²⁹ When several sureties unite in a guaranty, each one enters into the same contract with the creditor, but this includes no actual agreement among themselves. ³⁰ The court, therefore, defines the rights and duties of co-sureties upon the equitable principle that equality is equity. ³¹ Therefore, when several sureties have signed some obligation for a principal debtor, each is bound to contribute equally to its satisfaction upon the debtor's failure to make payment. ³² Hence, it follows that if one of the sureties pays the whole debt he may demand from the others that they contribute their respective shares, and if one is insolvent the others must still bear the burden equally. ³³ For example, if there were four sureties, and one paid the debt, he might call upon each of the others to contribute or repay to him one fourth of the amount advanced, and enforce such contribution by action; but in case one were insolvent, then the other two would each be obliged to contribute one third of the sum advanced. ³⁴ This is known in law as the *right of contribution* between co-sureties.

³⁵ On the same principle of equity, when one of the several sureties takes from the principal debtor a mortgage to indemnify him against his liability, the co-sureties have an equitable interest in the security so taken; and in case of the principal debtor's default, such security must be applied equally to the reduction of the liability of all.

11. ³⁶ The Right of Contribution Exists, where there is nothing by way of agreement between the sureties to alter their relations. If the last surety adds to his signature, "surety for the above names," or words to that effect, he does not become a co-surety, and would not be liable for contribution. ³⁷ If, on the other hand, he simply adds the word "surety," it does not affect his relation to the others, and he becomes a co-surety with them.

³⁸ The form of the undertaking, that is, the principal contract, upon which sureties are bound, does not affect their liability to each other. Where there is no express contract between them, as is usually the case, they are bound by the implied agreement to bear the responsibility equally.

12. Indorsers. ³⁹ The right of contribution does not usually apply in case of indorsers on commercial paper. ⁴⁰ They do not all enter into the same contract of guaranty (p. 84, sec. 9). Their obligations are successive, each entering into a new contract with the creditor, and each may collect the whole amount from his prior indorser in case he is obliged to take up the note or bill.

LESSON REVIEW.

1. When do the creditor's rights against the surety begin?
2. Give an illustration.
3. What is the most important right of the surety against the creditor?
4. What is meant by *subrogation*?
5. Is the surety entitled to securities held by the creditor of which he had no knowledge?
6. For whom, then, is the creditor said to take the securities?
7. How is this rule applied in the case of indorsers?
8. Where both the surety and the principal debtor have pledged property for the payment of the debt, in what order is it to be applied?
9. Prior to what time has the surety no rights against the principal debtor?
10. What may the surety do upon the default of the principal debtor?
11. May he recover costs which he has been obliged to pay?
12. Name the most important ways in which a surety may be discharged from liability.
13. How is he discharged by *expiration of time*?
14. To what extent does this affect his responsibility under his contract?
15. Under what form of guaranty may the surety terminate his liability by notice?
16. How do the two methods differ?
17. How does an alteration affect the surety's liability?
18. What is the legal effect of such an alteration?
19. What is the rule regarding extension of time by the creditor?
20. Why will not a mere promise to extend release the surety?
21. Will mere delay on the part of the creditor generally discharge the surety?
22. When will delay have that effect?
23. Does taking the note or draft of a third person as collateral security release the surety?
24. Give an illustration.
25. What must be the effect upon the creditor of an agreement that will release the surety?
26. Give an illustration of an extension that will discharge the surety?
27. What will prevent its having that effect?
28. By whom must the fraud be practiced to release the surety?
29. Is the contract of each co-surety with the creditor the same?
30. Upon what principle does the law define the rights and duties of co-sureties?
31. How is this principle applied?
32. How where one surety pays the whole debt?
33. Give an illustration.
34. What is this right among creditors called?
35. How is this equitable principle extended to securities taken by a co-surety?
36. When does the right of contribution exist?
37. If one surety merely adds the word "surety" after his name will it affect his relation to the others?
38. Does the form of the principal contract affect the sureties' liability to each other?
39. Does the right of contribution usually apply to indorsers?
40. Why not?

LESSON XLII.

BAILMENTS.

1. Definition. Bailment is another branch from the great trunk of contracts, and hence depends for its validity upon the same necessary conditions. ¹It is a delivery of goods in trust upon a contract express or implied, that the trust shall be faithfully executed on the part of the bailee. ²The person who delivers the goods is the *bailor*, and the one to whom they are delivered, and who undertakes the trust, is the *bailee*.

2. Classes. ³There are five classes of bailments, viz: (1) *Deposit*, (2) *Commission*, (3) *Loan for Use*, (4) *Pledge*, and (5) *Bailment for Hire*.

3. (1) ⁴Deposit, is a simple delivery of goods to be kept and returned without recompense. ⁵In this class of bailments the keeping is always gratuitous. ⁶This would seem to mean that it is a contract without consideration — a mere naked promise — which the law would not enforce. ⁷It must be remembered, however, that the property itself is actually delivered by the bailor, and accepted by the bailee, and the acceptance of this property, coupled with the trust, is held to be a sufficient consideration, upon which the law binds the bailee to fulfil the agreement. ⁸But a bailee without compensation need not continue in the custody of the goods. ⁹He may tender them to the owner, and terminate his responsibility. ¹⁰If the owner should refuse to accept the goods and take them away within a reasonable time, the bailee may remove them from his premises, and he will not be responsible for any resulting loss. ¹¹The bailor in this class of bailments, is frequently called a *depositor*, that is, the person who deposits the goods, and the bailee who receives the goods is known as the *depository*.

4. Finding Lost Property. ¹²When one finds money or other property that has been lost, he is not obliged to take it into his possession. ¹³If, however, he assumes to take it into his custody, a bailment is thereby created, and the law imposes upon him the duties of a depository, but at the same time it gives him this advantage, ¹⁴viz: that he thus acquires a special property in the thing found which will enable him to hold it as against everybody except the true owner. ¹⁵He must deliver the property to him, however, on demand, and he is not ordinarily entitled to any compensation for his services. ¹⁶When a reward has been offered, the finder acquires a right to the compensation named, which he may recover in an action at law. Some States have provided by statute for compensation to persons who take up and keep domestic animals found astray upon their land.

5. Rule of Liability. ¹⁷ The bailee is under varying degrees of liability in the different classes of bailments. ¹⁸ In deposit he is only liable for *gross negligence*, and hence bound to the exercise of slight diligence. ¹⁹ Gross negligence is defined as the want of that care which every man of common sense, however inattentive, takes of his own property. The rule cannot be exactly stated, because the circumstances and the nature of the property determine in a measure the kind of care demanded by the law. ²⁰ In general, the depositary must take as much care of the goods left with him as he does of his own. ²¹ For example, a bank receiving a box that is locked, containing gold and other valuables for safe keeping without compensation, is only liable for gross negligence. ²² A bailee is not answerable for a loss by robbery, theft, fire, or other casualty, unless it happens through his *gross negligence*. ²³ The depositary may of course enter into a special engagement to keep goods safely, and in that case he will be answerable for an increased degree of diligence.

6. Use of the Thing Deposited. ²⁴ The rule is that the depositary has no right to use the property left with him. ²⁵ This is modified, however, where the nature of the thing deposited is such that it would be benefited by moderate use without being thus subjected to any unusual risk. In those cases it will be presumed that the depositor intended such use to be made of the property. The law will imply his consent. ²⁶ For example, the depositary may exercise a horse or milk a cow, as such use would be beneficial to the animal.

7. Bailee's Duty to Return Property. ²⁷ The depositary is obliged to return the deposit, whenever it is properly demanded. He must not only return the very same thing left with him, and in the same condition as when it was received, but he must also return all increase or profit that may have been added to it. ²⁸ Failing to do this, he is responsible to the bailor for the amount of his loss, unless he can show that the property has been injured, destroyed or taken from him, without *gross negligence* on his part.

8. To Whom Delivered. The bailee receives the property from the bailor upon a contract which includes an agreement to return it to him. ²⁹ He cannot, therefore, on his own account, dispute his bailor's title. ³⁰ He should surrender the property to no one else unless he is compelled to do so. But the bailor may not be the owner. ³¹ He may have borrowed, found, or stolen the property, and in any event the true owner may go behind the contract of bailment and recover his property from the bailee.

³² Where several bailors deliver goods subject to their joint order, the bailee can only be compelled to return the property on the order or suit of the whole number; ³³ but when one of the owners delivers the property to the bailee it may be safely returned on his order. ³⁴ Where there are joint depositaries, each one is liable for the return of the whole deposit.

9. When Bailee Liable to Bailor. ³⁵ Under an ordinary deposit of goods, the bailee is not liable to the bailor until he is in default. ³⁶ This may result from his conversion of the property, that is, by his appropriation of it to his own use, or from its loss through his gross negligence, or from his refusal to return it

upon demand, which refusal is considered equivalent to a conversion of the property.

10. Necessary Expenses. This class of bailments, as has been said, is strictly gratuitous. ³⁷ But while no compensation can be allowed in the contract for the services of the bailee, yet he is entitled to be repaid all money disbursed for necessary expenses, and all payments he may have been obliged to make in order to preserve the property deposited.

11. (2) ³⁸Commission or Mandate. Bailments of this class are created where the bailee undertakes without compensation to do some act for the bailor in respect to the thing bailed. ³⁹ The bailor is generally termed the *mandator*, and the bailee the *mandatary*.

12. Rule of Liability. The same principles apply to this class of bailments as to deposit. It is also gratuitous, and therefore the rule as to diligence is the same. ⁴⁰ The mandatary, like the depositary, is only liable for *gross negligence*, and therefore held to the exercise of slight diligence. These two classes of bailments are also similar in regard to the relation of the parties. ⁴¹ The mandatary who wrongfully uses the thing bailed is liable to the mandator as for a conversion of the property.

13. Mandatary to Render an Account. ⁴² As the mandatary is charged with duties to perform, he is under an implied obligation to render to the mandator, whenever required, an account of all his proceedings in regard to the thing bailed. ⁴³ This should show either that the trust has been faithfully performed, or the reason or excuse for its not having been so performed. The mandatary, like the depositary must restore the property with all its increase, ⁴⁴ He is also entitled to have repaid to him all necessary expenses incurred in the discharge of his duty; and to be indemnified against liability incurred by him for the mandator, in the course of his dealings with the thing bailed.

14. (3) Loan for Use. ⁴⁵ A bailment of this class is a loan of some article of property for a certain time to be used by the bailee without paying for the use of it. ⁴⁶ It is therefore gratuitous on the part of the bailor, as where a man loans his carriage to a friend, without any agreement, express or implied, that he is to be paid for the use of it.

15. Rule of Liability. ⁴⁷ As the bailee or borrower pays nothing for the use of the property while the bailment is entirely for his benefit, he is bound to exercise extraordinary diligence, and is responsible for *slight negligence*. ⁴⁸ He is bound to exercise all the care and diligence which the most careful persons are accustomed to exercise in their own affairs, and the omission of this constitutes *slight negligence*.

⁴⁹ So rigidly is the rule of his responsibility construed that the slightest breach of trust will render the borrower liable, as where he uses the thing bailed to a greater degree or for a different purpose from that for which the loan was made.

⁵⁰ For example, it has been held that where the owner loaned his horse to a person to ride, the license extended no farther than the borrower himself, and that

it was a breach of trust to allow his servant to ride the animal. ⁶¹A different result follows where there are circumstances showing that this privilege of using the property was not intended to be restricted to the personal use of the borrower.

16. When the Borrower is Liable. ⁶²The borrower is never liable for any loss resulting simply and naturally from the proper use of the property. Nor is he liable for losses resulting from inevitable accidents or casualties occurring without his fault, such as robbery, fire, lightning, shipwreck, inundations, and sickness. But, as we have seen, slight negligence renders the borrower liable. ⁶³Hence, if one borrows a horse for a certain journey and, leaving the regular road, rides along some steep or rugged path, where the animal is injured or killed, he will be liable for the loss. If in any way the borrower takes the property loaned, or permits it to be taken into dangerous places, or used at improper times, he must bear any resulting loss.

17. Return of the Thing Loaned. It is the duty of the borrower to return the property loaned and all its increase within the time specified by the lender. ⁶⁴In the absence of any agreement, it must be returned within a reasonable time. Generally it must be returned to the place from which it was received, but, at all events, it must be restored to the custody of the owner.

18. Revocation. ⁶⁵It is generally understood that gratuitous loans may be recalled at any time by the lender, and yet it is the duty of the bailor not to revoke the license or recall the property until the period of the bailment has expired and its purpose been fulfilled.

LESSON REVIEW.

1. Define *bailment*.
2. Name the parties to the contract.
3. How many classes of bailments are there, and how are they designated?
4. What is a *deposit*?
5. Is the keeping of the goods with or without compensation?
6. What is the apparent result of this?
7. What is the consideration in this contract of bailment?
8. Must the bailee continue his possession of the goods?
9. How may he terminate his responsibility?
10. What may he do if the owner refuses to accept the property?
11. What are the *bailor* and *bailee* respectively called in this class of bailments?
12. Must one who finds property take possession of it?
13. What is the result where he does assume custody of it?
14. What advantage does he secure?
15. Is he ordinarily entitled to compensation for taking care of the article found?
16. Where a reward has been offered, what right does the finder acquire?
17. Does the liability of the bailee differ in degree in the several classes of bailments?
18. What is the rule of his liability in *deposit*?
19. What is *gross negligence*?
20. What care in general must the depositary take of the thing bailed.
21. Give an illustration.
22. What are some of the losses for which a bailee is not answerable?
23. How may a depositary increase his liability?
24. What is the rule as to the depositary's right to use the property left in his possession?
25. Under what circumstances and how is the rule modified?
26. Give an illustration.
27. When and in what condition must the depositary

return the property? 28. What will excuse him from thus delivering it? 29. May the bailee dispute his bailor's title? Why? 30. To whom must he return the property? 31. What right has the true owner of property, who is not the bailor, against the bailee? 32. Where joint-bailors deliver property, to whom must the bailee return it? 33. To whom, in case one of the owners delivers it? 34. What is the liability of joint-bailees? 35. When does the bailee become liable to the bailor? 36. From what may the default of the bailee result? 37. For what expenses is the bailor liable to the bailee? 38. What is the second class of bailments called, and how are they created? 39. What are the bailor and bailee respectively called in *commission*? 40. In what respect is the liability of the mandatary like that of the depositary? 41. What is the result of a wrongful use by the mandatary of the thing bailed? 42. When must the mandatary render an account to the mandator? 43. What should the account show? 44. What is the rule of liability regarding necessary expenses incurred by the mandatary? 45. What is a *loan for use*? 46. Is this a gratuitous bailment? Give an illustration. 47. For what negligence is the borrower liable, and to what diligence bound, and why? 48. What constitutes *slight negligence*? 49. How rigidly is this rule construed? 50. Give an illustration. 51. What circumstances may vary this liability? 52. For what losses is the borrower not liable? 53. For what losses is he liable? 54. When and where must the borrower return the goods? 55. What is the rule regarding the revocation of license by the bailor in gratuitous bailments?

LESSON XLIII.

1. (4) Pledge. ¹A pledge is a bailment of personal property to secure the payment of some debt or the fulfillment of some agreement. ²It is therefore a collateral security. ³In this class of bailments the bailor is called the *pledgor*, and the bailee, the *pledgee*. ⁴The general rule is that one may pledge any kind of personal property. ⁵The United State statutes, however, except from the operation of this kind of bailment all pension certificates. These can neither be pledged themselves, nor any right or interest in them.

2. Delivery to the Pledgee. ⁶The thing pledged must be delivered to the pledgee, otherwise the contract of bailment is not completed. The form of delivery depends upon the nature and situation of the property. ⁷Goods in transit, that is, in the hands of a carrier for transportation, may be delivered by a transfer of the bill of lading or freight receipt. ⁸This is called a *symbolic delivery*—not the actual manual delivery of the thing itself, but of a symbol which represents it. ⁹Heavy and unwieldy articles, like logs in a boom, may be delivered without moving them. ¹⁰Stocks and choses in action may be delivered

in pledge by a transfer which places them in the power of the pledgee. ¹¹ For example, shares of stock may be transferred by the same indorsement used in case of their actual sale (p 165, f 26), the pledgor taking a receipt or agreement from the pledgee showing for what purpose the transfer was made. ¹² Negotiable paper may be transferred by delivery only, where an indorsement is not necessary to convey title to it.

3. Pledge Distinguished from Mortgage. ¹³ When property is pledged or delivered as collateral security, the general title remains in the pledgor. ¹⁴ The pledgee only takes a special property in it. ¹⁵ This fact distinguishes a pledge from a mortgage, for the latter conveys the legal title to the mortgagee conditionally, that is, upon the condition that the mortgagor may redeem the goods within the time specified, in default of which the title becomes absolute in the mortgagee.

4. Rule of Liability. ¹⁶ This kind of bailment, unlike any of the preceding, is for the benefit of both parties. ¹⁷ The pledgor procures new or additional credit, and the pledgee is secured against loss or liability. ¹⁸ Therefore, as both parties are benefited by the pledge, the contract only binds the pledgee to the exercise of *ordinary diligence*, and renders him liable for *ordinary negligence*, ¹⁹ which is the omission of that care which every man of common prudence takes of his own property.

5. Use of the Thing Pledged. ²⁰ If the use of the pledge is necessary to its preservation, then the pledgee not only may, but it is his duty, to use it in a legitimate and proper manner. But if, on the other hand, the use of it would be injurious, then it must not be used. ²¹ Where, as in the case of an animal, for example, a horse, the pledgee is under expense for feeding and caring for it, then it may be used by way of recompense.

6. Pledgee's Interest in the Pledge. ²² The pledgee has a right to the possession of the thing pledged for the time and object contemplated in the contract. ²³ He has a special property in it, and may defend his interest against all persons, even including the pledgor himself. But this interest is inseparably involved with the debt or obligation for which the pledge is collateral. ²⁴ The pledgee cannot hold the property as security for any other debt than that for which it was pledged, except by special agreement with the pledgor. ²⁵ It is, however, security not only for the debt or obligation, but also for all interest and incidental charges growing out of it. ²⁶ The debt itself may be assigned with the pledge.

²⁷ The pledgee's interest depends upon his continued possession, and hence a loss or re-delivery of the property to the pledgor will deprive him of his security, though this would not result from a re-delivery to the owner for some special purpose.

7. Pledgee's Right to Sell the Pledge. If the pledgee's right of possession were all he secured under the contract of bailment, he would not be able to reimburse himself for the loss of the original debt. The property is not for-

feited by the pledgor's failure to pay the debt, hence the pledgee must have some further right to complete his protection. ²⁸ This he has in his right of sale.

²⁹ As a preliminary to the exercise of this right he must make a proper demand of payment upon the pledgor, after the debt becomes due. ³⁰ Payment having been refused upon such demand, the pledgee may commence an equity action to foreclose the right of the pledgor, and have the property disposed of at a judicial sale, or he may, upon giving reasonable notice to the pledgor to redeem, and of the time and place of sale, proceed and sell the things pledged, and apply the proceeds to the payment of the debt.

³¹ The sale must be open and public, and the notice is indispensable, for without that the sale would be a conversion of the property, and would render the pledgee liable for damages.

³² The pledgee has not such an interest in the property as will enable him to retain and appropriate it to the payment of his debt. ³³ He must sell it and apply the proceeds, and he is not allowed to be the purchaser of it, even at a public sale. ³⁴ But the pledgee can in no case sell the thing pledged or maintain an action to foreclose, until the original debt becomes due.

There is one exception to the rule requiring a sale of the thing pledged. ³⁵ Where the pledge consists of negotiable paper, the pledgee has no right to sell it, but it is his duty to collect the money and apply it upon the debt.

8. Liability of Pledgee for Loss. ³⁶ While the relation of bailor and bailee lasts, the pledgee is not responsible for loss arising from unforeseen or unavoidable accident, or superior force, or where the property is destroyed by reason of its own inherent defect or infirmity. ³⁷ He will not, however, be relieved from liability if he has himself been guilty of some neglect or violation of duty connected with, or leading to, such loss. As soon as the relation of bailor and bailee ceases, the pledgee loses his special property in the thing bailed. ³⁸ This happens in case the pledgor tenders to him the whole amount due, with interest and expenses, and he refuses to accept payment and surrender the pledge. ³⁹ He then becomes a wrong-doer, and is liable for all damages to the property pledged.

9. Pledgor's Right to Redeem. ⁴⁰ The right of the pledgor to redeem his pledge is absolute until it is cut off as already shown, by foreclosure and sale, or by sale made upon notice; ⁴¹ and this is true, although payment of the debt to which the pledge is collateral is not made when due. ⁴² But whenever payment is made or tendered, the pledgee is bound to surrender the pledge. ⁴³ In case of the death of either party, his rights pass to, and may be enforced by, his personal representatives.

LESSON REVIEW.

1. What is a *pledge*? 2. What kind of a security is it? 3. What are the bailor and bailee respectively called? 4. What kind of property may be pledged? 5. What exception is there to the rule? 6. Must the thing pledged be delivered? 7. How are goods in transit delivered? 8. What is this

delivery called, and what does it mean? 9. What articles may be delivered without moving them? 10. How may stocks and choses in action be delivered? 11. Give an illustration. 12. How may negotiable paper be delivered? 13. Where property is pledged, in whom is the general title? 14. What property in it does the pledgee take? 15. How does this distinguish a pledge from a mortgage? 16. Whom does this kind of bailment benefit? 17. How are they benefited? 18. To what degree of diligence does this bind the pledgee, and for what negligence does it make him liable? 19. What is *ordinary negligence*? 20. Under what circumstances should the pledgee use the property pledged, and when should it not be used? 21. When may the pledgee use the thing pledged by way of recompense for expenses incurred? 22. For what time and purpose has the pledgee a right to the possession of the thing pledged? 23. Against whom may he defend his interest? 24. May he hold the property as collateral security for any other debt than that for which it was pledged? 25. Is it security for anything more than the debt itself? 26. May the debt be assigned with the pledge? 27. Upon what does the pledgee's interest in the property depend, and how may his security be lost? 28. What other important right has the pledgee? 29. What is the first preliminary to the exercise of this right? 30. Upon refusal of payment, what courses may the pledgee pursue? 31. How must the sale be conducted, and what would be the effect of selling without notice? 32. May he retain the property and appropriate it to the payment of his debt? 33. May he be the purchaser at a sale of the property? 34. May he foreclose or sell before the original debt becomes due? 35. What exception is there to the rule that the property pledged must be sold, and how must the pledgee secure his rights in that case? 36. For what losses is he generally not liable? 37. When will he be liable for such losses? 38. How does a tender to the pledgee affect the relation of the parties? 39. In what way does this affect the pledgee's liability? 40. How long does the pledgor's right to redeem continue? 41. Is this true even after the debt is past due? 42. When must the pledgee surrender the pledge? 43. In case of the death of either party, who succeeds to his rights?

LESSON XLIV.

1. (5) **Bailment for Hire.** 'This is a bailment of personal property where a compensation is to be given for its use, or for labor or services about it. 'It is the most important class of bailments, as it includes all contracts of hiring. 'It may be divided into (1) *Hire of Things*, (2) *Hire of Services*, (3) *Hire of Custody*, and (4) *Hire of Carriage*.

2. **Hire of Things.** 'This means the hire of a chattel for a particular use

and for a given time. ⁵ Here the bailor is often called the *letter* or the *letter to hire*, and the bailee is known as the *hirer*.

3. Rule of Liability. ⁶ The hire of things is manifestly for the benefit of both parties, and hence the hirer has the same responsibility as a pledgee. ⁷ He must exercise *ordinary diligence*, and care, and he is responsible for *ordinary negligence*. ⁸ Hiring a horse, for example, he must feed, water, and drive the animal with prudence and fairness. ⁹ As in the preceding classes of bailments, he is not liable for loss arising from inevitable casualty or superior force, where it has not occurred through his failure to use the degree of care and diligence for which he is responsible.

¹⁰ While the general rule is that in case of loss the letter must give proof of sufficient negligence to charge the hirer, yet if the chattel is injured in a way that would not ordinarily occur without his negligence, the hirer, in order to escape liability, must show that such injury was not the result of his negligence.

¹¹ A bailee must answer for the negligence of his servants, when engaged in his services. ¹² But where the bailor sends his own servant to take care of the property the bailee is not responsible for the negligence of such servant.

4. Letter's Duty. ¹³ The duty of the letter is to deliver the property to the hirer as agreed, and not in any way to interfere with his possession or use of it. ¹⁴ By implication of law he warrants the title and possession to the hirer.

5. Hirer's Duty. ¹⁵ He is bound to use the property in the manner and for the purpose contemplated by the contract. ¹⁶ For example, if he hires a span of horses and carriage to drive on a journey, he must not take the team off the carriage and use them on a plow or reaping machine. ¹⁷ This would not only render him liable for damages for his breach of the contract, but it would change the degree of his liability, so that should the horses be injured or killed even by casualty or inevitable accident, he must answer for the loss.

¹⁸ The hirer has a special property in the thing bailed, and is entitled to the exclusive possession of it as against all persons, including the owner himself. ¹⁹ To such a degree is this true that if the property be unlawfully taken the owner cannot maintain an action to recover its possession. It must be brought by the bailee.

²⁰ It is the hirer's duty to return the property to the owner when the purpose of the bailment is fulfilled. ²¹ If he negligently or wrongfully delivers the thing hired to some other person, it amounts to a conversion of it. ²² He must restore it in as good condition as when he received it, except for the effect of natural wear, unavoidable accident, and the act of God. And he must pay the amount stipulated for the hire of the property.

²³ This bailment is terminated by the expiration of the time, or the fulfillment of the object for which it was made; by the destruction of the property, if without the fault of the hirer; by agreement of the parties; and by operation of law, as where the hirer becomes the owner of the thing bailed.

6. The Hire of Services. ²⁴ The delivery of goods to be manufactured, or to have some work done upon or about them, creates a contract of bailment of

this kind, ²⁵ as where a watch is delivered to a jeweler, to be repaired and returned. ²⁶ Unless the specific property is to be returned, it is not a bailment but a sale.

7. Liability for Loss. One of the very important questions arising in connection with this kind of bailment is in regard to the liability in case of the destruction of the property while undergoing repairs or in the process of manufacture, without the fault of the workman. ²⁷ The general rule is that the responsibility follows the ownership of the materials, that is, the party owning the materials must bear the loss. ²⁸ For example, if I give an order to a cabinet-maker for an oak sideboard, and when partly finished the factory burns, and it is destroyed, he is the loser; but if, on the other hand, I take the oak lumber to the cabinet-maker and engage him to make it into a sideboard, which is destroyed by fire without his fault, then I must bear the loss. ²⁹ And this would be true, though he might have added other materials in the course of its construction. ³⁰ But this does not cover my entire loss, for I must pay him for his labor and materials, unless his contract was to complete the work for a specified sum, so that his complete performance is a condition precedent to his recovery.

8. Duties of Bailor. ³¹ The bailor or employer is bound, as in all dealings to good faith. He must pay the workman the agreed compensation for his services, and a fair price for materials used; he must do what is necessary on his part to facilitate the work, and in general he must fulfil the conditions of his contract.

9. Duties of Workman. ³² The workman must carry out his part of the contract. ³³ If the article is to be finished by a certain time, or to be used on a particular occasion, he must have it ready according to agreement. ³⁴ If the work be of an ordinary kind, he may employ others to do it for him. ³⁵ You employ a carpenter to make you a flower stand, and he may have one of his employees do the work. ³⁶ If, on the other hand, the contract implies the exercise of the personal skill of the workman, he cannot, without permission, have the work done by any other person. ³⁷ For example, if you engage an artist to paint a picture for you, he cannot require you to accept a painting which he has employed some other artist to make, no matter if it is even superior to the work he could himself do.

The workman must use the materials furnished him, ³⁸ and if any are provided by him they must be such as are proper for the use required. ³⁹ He is liable for defects resulting from his own fault and from that of his employees.

10. Degree of Skill Required of Bailee. ⁴⁰ This kind of bailment is for the benefit of both parties, and by analogy the bailee should be responsible only for *ordinary diligence*, but this rule must be modified in its application to *the hire of services*, because the subject includes all services, and in some instances great skill is necessary. ⁴¹ Whenever that is the case the degree of care and diligence necessary on the part of the person employed increases in proportion to the skill required. ⁴² A general statement of the rule is that the bailor may require nothing farther than the ordinary skill in the particular business or employment of

the bailee. But this would be very different in the case of a blacksmith hired to forge a log chain, and an instrument maker, employed to manufacture a microscope.

⁴³ Where a workman engages to do some special work requiring a particular kind of skill, he must be presumed to possess it in an ordinary degree; ⁴⁴ and if he fails to exercise such skill, or does not, in fact, possess it, he will be responsible to his employer for damages resulting therefrom.

11. Part Performance. ⁴⁵ The rights of the bailee, in case of part performance, where the failure has not resulted from his default or negligence, depends upon the nature of the contract. ⁴⁶ If he has been employed by the day, he may recover what his work is reasonably worth after deducting any damages resulting from his default. ⁴⁷ If, on the other hand, his contract is for the performance of some particular thing—an entire contract—he is bound by its terms, and cannot recover in case of his failure to complete the work.

12. Hire of Custody. ⁴⁸ This is a kind of bailment in which property is placed in the hands of the bailee to be kept and cared for by him for a compensation. ⁴⁹ It is for the benefit of both parties, and hence binds the bailee to the use of *ordinary diligence*, and makes him liable for *ordinary negligence*.

Warehouseman. ⁵⁰ The delivery of goods to a warehouseman for storage creates a bailment of this kind. ⁵¹ He is bound to ordinary diligence in caring for the goods, hence he is not liable for a loss resulting from inevitable casualty, unless he has been guilty of ordinary negligence in permitting such loss.

⁵² The warehouseman has a lien upon the goods to the extent of his charges. ⁵³ It is a specific lien upon any given parcel for its storage, but even if a part of it be delivered to the owner, the bailee may retain his lien upon the balance for his entire claim.

⁵⁴ A *wharfinger* keeps a wharf for the purpose of receiving to or shipping from it goods for hire. ⁵⁵ He has the same lien for his charges, and his responsibilities are the same as those of a warehouseman, unless he is also a common carrier, which is often the case, when his liability is greatly increased, as we shall hereafter find.

⁵⁶ *Forwarders*, who receive and forward goods, and *agisters*, who receive cattle and horses for pasture, have substantially the same duties and liabilities as warehousemen.

LESSON REVIEW.

1. What is a bailment for hire? 2. How does this rank in importance with the other classes of bailments? 3. How is it divided? 4. What is meant by the hire of things? 5. How are the bailor and bailee respectively designated in this kind of bailment? 6. Why is the responsibility of hirer like that of the pledgee? 7. State the rule of diligence and negligence by which the hirer is bound. 8. Give an illustration. 9. For what losses is the hirer generally not responsible? 10. What is the general rule in regard to proof of negligence in charging the hirer, and what exception is there to it? 11. Is a bailee liable for the negligence of his servants? 12. Is he liable for the negligence of the

bailor's servants? 13. What is the latter's duty? 14. What warranties on his part does the law imply? 15. What is the hirer's duty? 16. Give an illustration. 17. What liability would such improper use of the horses impose upon him? 18. What property does the hirer have in the thing bailed, and against whom does this entitle him to its possession? 19. Who must maintain an action for the possession of the property when it has been unlawfully taken from the bailee? 20. When must the hirer return the property to the owner? 21. What is the result of wrongfully or negligently delivering it to some other person? 22. In what condition must he restore the property to the owner? 23. How is this kind of bailment terminated? 24. How is a bailment of the kind known as *hire of services* created? 25. Give an illustration. 26. If the specific property is not to be returned, is it a bailment? 27. What is the general rule of liability in this kind of bailment? 28. Give an illustration. 29. Does the same rule apply where the workman has added other materials? 30. When is the workman entitled to payment for his labor, and when is he not in case of such loss? 31. What are the duties of the bailor? 32. What is the duty of the workman in regard to his contract? 33. Give an illustration. 34. When may he employ others to do the work for him? 35. Give an illustration. 36. When must he do the work himself? 37. Give an illustration. 38. What must be the character of materials furnished by the workman? 39. For what defects is he liable? 40. For what degree of diligence is the bailee generally responsible in this class of bailments, and why must it be modified in case of hire of services? 41. In case great skill is required, in what proportion must the care and diligence of the bailee increase? 42. Give a general statement of the rule as to the degree of skill necessary. 43. When a workman engages to do some particular work, what degree of skill must he be presumed to possess? 44. In case he does not possess such skill, for what is he liable? 45. In case of part performance, upon what do the rights of the bailee depend? 46. What may he recover where he has been employed by the day? 47. When may he not recover in case of part performance? 48. What is meant by *hire of custody*? 49. Who is benefited by it, and to the exercise of what diligence is the bailee therefor bound, and for what negligence is he liable? 50. What kind of bailment is created by the delivery of goods to a warehouseman for storage? 51. To what diligence is he bound? 52. For what has the *warehouseman* a lien upon the goods? 53. Is it affected by a delivery of a part of the parcel or goods upon which it exists? 54. What is a *wharfinger*? 55. What lien has he, and what are his responsibilities? 56. What are *forwarders* and *agisters*, and what, substantially, are their liabilities?

LESSON XLV.

INNKEEPERS.

1. Definition. ¹ Taverns, inns, or hotels are houses of entertainment for travelers. ² The business of keeping them is of a public nature. The keeper is often licensed to sell liquor. ³ The statute governs the issuing of the license, but it does not regulate the business of innkeeping. ⁴ There are, however, in many of the States, statutes fixing the liabilities of innkeepers. ⁵ The keeper is commonly known as a *landlord*, and the traveler whom he entertains as a *guest*. ⁶ Simply entertaining travelers occasionally does not constitute the host an innkeeper. He is neither subjected to an innkeeper's liabilities, nor entitled to his right of lien (p 190, s. 6). ⁷ The question whether a house is or is not an inn cannot be determined by the extent of its accommodations. ⁸ It is an inn where the proprietor, as a business, furnishes beds and provisions for all travelers. ⁹ He offers the accommodations of his house to the public, and hence he must serve those who apply. He cannot select his guests. ¹⁰ The keeper of a boarding house is not regarded, under the common law, as an innkeeper, because he may receive only such persons as he chooses.

2. Landlord's Duties. The keeper of an inn is bound to receive travelers. ¹¹ He may demand payment in advance for their entertainment; ¹² but having room he must receive all travelers and their baggage at any hour of the day or night. ¹³ He is not, however, bound to receive drunken or disorderly persons, nor such as are infected with contagious diseases, or who would otherwise endanger the safety of his guests, and if they become so while at his house, he may require them to leave.

3. Guests. Persons received and entertained at an inn or hotel are termed *guests*. ¹⁴ A guest is supposed to be a traveler—a wayfaring man—though he may remain a longer or shorter time as the case may be; ¹⁵ but if he enters into a contract with the inn-keeper for board and lodging or either, he ceases to be a guest, and becomes simply a boarder. ¹⁶ He is not a guest where he sends his horse to the inn to be stabled over night, while he lodges elsewhere.

4. Landlord's Liability. ¹⁷ The innkeeper is liable for the property of a guest intrusted to his care, under the same strict rule that governs *common carriers*. ¹⁸ He insures its safety, and can only be relieved from liability for loss by showing that it was occasioned by the act of God or the public enemy, or resulted from the guest's carelessness, or that the guest was robbed by his own servant or companion. ¹⁹ The innkeeper's liability only ceases when the guest has actually left the premises.

5. Delivery of Property to Landlord. ²⁰ In the absence of any requirement to that effect, the goods of a guest need not be actually delivered to the innkeeper: the delivery may be implied. He is liable for the loss if the goods be stolen from the guest's room, or wherever they may have been left in the house.

²¹If, however, the landlord gives due notice that property must be deposited in some safe place provided by him or he will not be responsible for its loss, and the guest neglects to do this, he cannot recover its value from the landlord in case it is stolen or destroyed.

6. Landlord's Lien. ²²The innkeeper has a lien upon the goods and baggage of his guest for his reasonable charge. ²³The law gives him this lien on account of his extraordinary liability, and because he is bound to receive and entertain strangers. ²⁴This lien covers goods brought to the hotel by a guest, even though they belong to some other person, provided the landlord does not know that fact. The lien attaches to whatever goods and chattels have been actually or impliedly delivered to the landlord. ²⁵But he cannot take from a guest other things and subject them to his lien.

7. Boarding Houses. ²⁶A boarding house differs from a hotel, in being designed for permanent boarders, and not open to the public. The proprietor does not assume the liability or become entitled to the rights of an innkeeper. In some States the statute gives him a lien upon the boarder's property for his charges.

²⁷As we have seen (p189, s. 3), a person may be a boarder at a hotel, as to whom the landlord is merely a boarding-house keeper. Most landlords have permanent boarders, and thus combine the positions of innkeeper and boarding-house keeper.

COMMON CARRIERS.

8. Definition. ²⁸*Common carriers* are persons who, as a business, undertake for hire to transport from place to place the goods of all who choose to employ them. The mode of transportation is not material. ²⁹Express, rail-road, and steamboat companies are common carriers. So also are public truckmen in cities, and the proprietors of stage lines carrying goods. ³⁰Two things are necessary to make one a common carrier, viz.: (1) a continual offer to the public to carry all goods intrusted to him for that purpose that come within his line of business, and (2) the charge of a reasonable compensation for his risk and the labor performed by him.

9. Duty to Receive Goods. ³¹The *common carrier* enters into business voluntarily, and he may retire from it at any time. ³²As long, however, as he conducts the business it is his duty to receive and transport all such goods as he is accustomed to carry. ³³Within these limits he cannot discriminate, but must receive the goods of all who offer them to the extent of his carrying capacity.

10. Carrier's Liability. ³⁴The rule governing his liability rests on grounds of public policy. ³⁵It makes him answerable for the safety of the goods. He becomes an insurer of their safety and is responsible for them, unless they are injured or lost by the act of God or by the public enemy (p. 44, s. 10). ³⁶Even then the carrier is not excused from liability where his previous neglect brings the property into danger resulting in such loss, as where his delay exposes it to destruction by a flood. This rule of liability has been modified in some of the

states. ³⁷ In order to excuse the carrier it must be shown that the superior force was the direct cause of the loss. ³⁸ He cannot escape the responsibility for it by showing that the loss was the result of natural causes, against which he could have guarded the property by the exercise of skill and foresight.

The presumptions are all against the common carrier. ³⁹ But the rule does not hold him liable for a loss arising from the action of natural causes, except as above noted. ⁴⁰ He is not answerable for the effect of heat upon a cargo of lard, or for the natural decay of a load of fruit, or for the injury of an animal caused by its own evil disposition or tendencies.

⁴¹ A railroad company cannot avoid liability by showing that the delay was caused by misconduct of its servants, such as a strike of its engineers.

⁴² Where the master of a vessel is compelled by storm at sea to cast overboard a part of the cargo, he is not liable for the loss as a common carrier.

11. How Liability Limited. ⁴³ The common carrier may limit his liability as an insurer of the goods, and in some of our states he may by contract exempt himself from responsibility for losses arising from want of diligence on the part of his servants. ⁴⁴ In other states he is not permitted to exempt himself from liability either for his own negligence or that of his employees. ⁴⁵ He cannot, merely by a published notice, or even by a notice brought to the attention of the owner, limit his liability for the kind of goods usually carried by him; ⁴⁶ but it must be done, if at all, by a clause to that effect in the contract. ⁴⁷ Such limitation incorporated into a bill of lading or receipt given for the property becomes a part of the contract between carrier and owner.

⁴⁸ The common carrier may, however, limit his liability by a general notice to the effect that he will not be responsible for articles like money or jewelry which are not within the regular line of his carrying trade.

12. Carrier's Duty in Respect to the Property. The carrier assumes certain duties in respect to the manner of carriage, such, for example, as properly loading his ship. ⁴⁹ He is bound to heed the owner's directions regarding the mode of placing packages. ⁵⁰ Where he receives, for instance, a box marked "Glass. With care. This side up," he is bound to follow these instructions. He must also observe carefully the owner's directions in regard to forwarding the goods at the end of his line, and he must in any event do this without delay, or he will be liable for resulting loss. ⁵¹ The address is an instruction. ⁵² It is the duty of a carrier, and he impliedly undertakes to furnish, a sound and sufficient conveyance. ⁵³ He is bound to give preference in transportation to perishable property.

The carrier is bound to pursue the route agreed upon. ⁵⁴ If he takes a different course he at once becomes liable for a loss, although resulting from causes which would have otherwise exonerated him, such as the act of God or the public enemy.

⁵⁵ When the goods are addressed to a consignee at a point beyond the route of the first carrier, a delay of the second carrier in receiving them does not exonerate the first carrier. ⁵⁶ When the first carrier contracts for the entire distance,

he is bound according to the terms of his agreement, and must deliver them at the place specified, and be responsible for them over the routes of other carriers.

LESSON REVIEW.

1. What is an inn, and by what other names is it known? 2. Is the business of keeping an inn of a public or private nature? 3. Is the business of an inn keeper regulated by statute? 4. Are his liabilities ever fixed by statute? 5. By what name is the keeper commonly known, and who is a *guest*? 6. Does the occasional entertainment of travelers constitute one an innkeeper? 7. Does the extent of its accommodations determine whether a house is an inn? 8. When is it an inn? 9. To whom does he offer the accommodations of his house? Can he select his guests? 10. Why is not the keeper of a boarding house regarded in law as an innkeeper? 11. May the innkeeper demand payment in advance? 12. When must he receive travelers? 13. What persons is he not bound to receive? 14. Does the mere fact of staying a longer or shorter time determine one's character as a guest? 15. How may a guest become simply a boarder? 16. Does stabling one's horse at an inn make him a guest? 17. Under what rule is the innkeeper liable for the property of a guest? 18. How may he be relieved from liability for its loss? 19. When does his liability cease? 20. When is it not necessary for the guest to actually deliver his goods to the landlord? 21. What neglect of the guest would relieve the landlord from liability for the loss of his property? 22. What lien has the innkeeper on the goods of his guest? 23. Why does the law give him this lien? 24. What goods does it cover? 25. May he take from the guest other goods and subject them to his lien? 26. How does a boarding-house differ from an inn? 27. May the two be combined? 28. Define *common carriers*. 29. Give illustrations. 30. How many and what things are necessary to make one a common carrier? 31. Is the common carrier ever compelled to remain in business? 32. What is his duty in regard to receiving and carrying goods? 33. May he discriminate in regard to what kind of goods he will receive? 34. On what ground does the rule governing his liability rest? 35. To what responsibility does it bind him? 36. When is he not relieved from liability from loss resulting from the act of God or the public enemy? 37. Must the loss be shown to be the direct result of superior force to excuse the carrier? 38. When will he not be excused from loss resulting from natural causes? 39. Is he generally liable for losses resulting from natural causes? 40. Give illustrations. 41. Will the strike of its engineers relieve a railroad company from liability? 42. Is the master of a vessel liable for loss when compelled to throw overboard part of his cargo? 43. May a common carrier limit his liability as an insurer? 44. May he exempt himself from liability for the negligence of himself or his employees? 45. May he limit his liability by a published notice? 46. How must it be done? 47. What is the effect of incorporating such a limitation into a bill of lading or receipt? 48. As to what articles may a carrier limit his liability by a general notice? 49. What directions of the owner is he bound to follow? 50. Give an illustration. 51. Is the address an

instruction? 52. What kind of conveyance is he bound to furnish? 53. What is his duty in the transportation of perishable property? 54. How is a carrier's liability affected by his taking a different route from the one agreed upon? 55. Does the delay of a second carrier in receiving goods exonerate the first? 56. How is a carrier bound where he contracts for the entire distance?

LESSON XLVI.

1. Delivery by Carrier. ¹ Delivery by the carrier is necessary to the complete performance of his contract. ² The mode of delivery is regulated by circumstances such as the kind of conveyance, the nature of the goods, and custom. ³ A carrier by coach is bound to deliver to the consignee at his residence or place of business. ⁴ An express company is bound to make an actual delivery to the consignee. It must carry the parcel into his place of business or to his residence. Baggage must be delivered at a proper time and in a reasonable manner. ⁵ A carrier by ship has not the means of moving merchandise upon the land, and hence he is permitted to unload his vessel at the wharf where he is accustomed to discharge his cargo, and complete his delivery by giving notice to the consignee within a reasonable time. ⁶ Substantially the same rule applies and upon similar grounds to railroads. ⁷ They deliver at their stations and give notice to the consignee of the arrival of his freight. ⁸ When, after such notice, he has had a reasonable time and opportunity to remove the goods, the railroad company ceases to be liable as a common carrier, and is only held to the responsibility of a warehouseman. ⁹ In some states notice and a reasonable time to remove the goods is not required to relieve the company from its liability as a common carrier, but it is so relieved by simply unloading and storing the goods.

¹⁰ As the carrier is obliged to deliver the goods, he is liable for any misdelivery of them, as where they are delivered to the wrong person. This rule in regard to delivery is applied with great strictness to all bailees. ¹¹ When the consignee cannot be found, or being found, refuses to receive the goods, it is the carrier's duty to store them with a responsible warehouseman.

2. Carrier's Charges and Lien. ¹² It is not necessary that the amount to be paid as freight should be stated in the contract. It usually is agreed upon, however, and the carrier has a right to demand payment upon delivery of the goods.

¹³ It is a rule of law that no freight is earned until the goods have arrived at the end of the carrier's route, or at the place of destination. ¹⁴ This, however, does not relieve the owner from liability for freight, where he intercepts the goods and receives them at some point short of their destination.

¹⁵ When goods must pass over the routes of two or more carriers, as express or railroad companies, the course of business allows the second carrier to pay the

freight already earned by the first, and collect the whole at the place of delivery.

¹⁶ The carrier's lien for his freight is in its nature a right to detain the property, and hence it is waived by a voluntary delivery of it.

3. Carriage of Live Stock. ¹⁷ In the case of live stock, the common carrier is responsible for any injuries that could have been prevented by care and diligence. He is not, however, liable for losses or injuries arising from the peculiar habits or instincts of the animals transported by him.

4. Carriers of Passengers. ¹⁸ A carrier of passengers becomes such by entering upon the business. ¹⁹ So doing, he makes an engagement with the public, and becomes bound to convey all persons who pay or tender the usual fare.

5. Rights and Duties of Carriers of Passengers. ²⁰ They have a right to prescribe reasonable rules and regulations in regard to the manner of receiving passengers. They are not bound to receive and carry a drunken or disorderly person. ²¹ They may insist that the fare be paid in advance, and that each passenger shall show his ticket upon request. ²² For a refusal to pay they may refuse to receive a passenger, and for a refusal to show his ticket they may put him off, but must not use unnecessary violence.

²³ The ticket is a token of the contract, but not the contract itself. ²⁴ Both parties are bound by the agreement, and the law will enforce it according to its terms. ²⁵ If the parties have agreed that a railroad ticket shall be used only on a particular train or day, it cannot be otherwise used.

6. Baggage. ²⁶ It is now held that a passenger's fare includes payment for the carriage of necessary baggage. ²⁷ On this the carrier has a lien for his fare, and he is liable for it as a common carrier. There has been some difficulty in determining what should be properly included under the term "baggage." ²⁸ It is now held to comprise anything which even an eccentric traveler may carry on a long journey for his personal convenience. Samples of goods, silverware and money in large quantities cannot be considered as baggage.

²⁹ The carrier cannot limit his liability for baggage by a general notice, though he may make a special contract to that effect. ³⁰ Where a limitation of that kind is printed on the ticket delivered, and the passenger's attention is called to it, then the law may imply an assent to it on the part of the passenger.

³¹ A delivery of baggage to the carrier must be clearly proven, in order to make him responsible. ³² A railroad check is *prima facie* proof of such delivery. ³³ The custom of checking baggage received on boats or the cars, makes it the duty of passengers to see that this is properly done. The usage must be properly followed. ³⁴ It is the duty of the carrier to transport the baggage in the same conveyance or train with the passenger; and he must deliver it to him when he stops.

³⁵ A passenger has a reasonable time after the arrival of a boat or train within which to remove his baggage, and during that time the carrier's liability continues.

³⁶ Where a railroad company sells through tickets over its own and other roads,

forming a continuous connection, and checks the baggage of its passengers through to their destination, it is bound to deliver it at that point, and is liable for it there.

7. Liability of a Carrier of Passengers. ³⁷ He is not liable under the same strict rule as the common carrier of goods, who is an insurer of the property; and yet he is held to a very strict responsibility. ³⁸ The law binds him to the exercise of competent skill and extraordinary care. It exacts from him the highest degree of diligence and foresight. ³⁹ A railroad company is bound to exercise the greatest care, and to procure and use roadworthy cars and coaches; and it has even been held liable for any hidden defects in structure. It must use the greatest care and diligence in the management of its trains and in the construction of its tracks and bridges. ⁴⁰ Its vigilance must increase in proportion to the increase of danger. ⁴¹ A train moving thirty miles an hour demands more care than one running twenty miles an hour.

⁴² It is not necessary that a person should have paid his fare or got on board in order to give him protection as a passenger. ⁴³ He is entitled to the same protection while waiting at the station, or crossing a track to reach a car.

⁴⁴ Carrier's of passengers are answerable for the negligence or misconduct of their employees while engaged in their service. ⁴⁵ For example, the proprietor of a stage coach line is liable to a passenger for injuries resulting from the overturning of a coach while the driver was racing with other vehicles.

8. Negligence is a failure in duty. It is a default in the diligence required by law.

⁴⁷ Where one sues a carrier to recover damages for personal injuries, it must appear that his own negligence did not contribute to such injuries. ⁴⁸ This is the general rule, but in some States, even if the injured person has been negligent, he may recover in case the carrier was guilty of greater negligence in causing the injury.

⁴⁹ The carrier of passengers may limit his common law liability to some extent, but this must be done in every instance by a contract that is perfectly explicit, and that covers the particular case.

9. Negligence as to Third Parties. ⁵⁰ Railroad companies are liable for negligence the same as individuals. ⁵¹ When their tracks cross public highways, they must take every precaution to avoid injury to life or property. They must carry out the provisions of the statutes requiring the building of fences and cattle guards; the ringing of bells; and conformity to certain rates of speed.

⁵² Where one is injured by a train which he could neither see nor hear, he is not chargeable with negligence. ⁵³ This, however, assumes the possession of all his senses, and if his not seeing or hearing the train resulted from his being blind or deaf, the railroad company will not be liable where it has taken the usual and proper precautions.

⁵⁴ Carriers of passengers by water are subject to the same liability as carriers by land. They must furnish seaworthy ships, and have them manned, equipped,

and navigated in a proper and skillful manner. They must also obey the laws and the established rules of navigation.

LESSON REVIEW.

1. Is delivery to the carrier necessary? 2. How is the mode of delivery regulated? 3. Where is a carrier by coach bound to deliver goods? 4. Where must an express company deliver goods? 5. Where does a carrier by ship deliver merchandise, and what other step must he take in order to make the delivery complete? 6. Does the same rule apply to railroads? 7. How must they deliver freight? 8. How long after such circumstances does the railroad remain liable as a common carrier, and what is its liability thereafter? 9. How is this rule varied in some of the States? 10. Is the carrier liable for a misdelivery of the goods? 11. What course may the carrier pursue when the consignee cannot be found? 12. When has the carrier a right to demand payment of freight? 13. What is the rule of law regarding the time when freight is earned? 14. When the owner intercepts his goods before reaching their destination, does this rule relieve him from the payment of freight? 15. What is the rule regarding the payment of freight where the goods pass over the routes of two or more common carriers? 16. What is the effect upon the carrier's lien of a voluntary delivery of the property? 17. How far is the carrier liable for injuries to live stock? 18. What constitutes one a carrier of passengers? 19. What persons is he bound to convey? 20. What rules and regulations has he a right to prescribe? 21. When may he require the payment of fares? 22. What right has he in case of a refusal to pay fare, and what right in case of refusal to show ticket? 23. Is the ticket the contract? 24. How are the parties bound by the agreement? 25. Give an illustration. 26. How does the passenger pay for the carriage of his baggage? 27. Has the carrier a lien on the baggage for his fare, and what is his liability for it? 28. What is *baggage*? 29. How may the carrier limit his liability in regard to baggage? 30. When and on what grounds may a limitation printed on a ticket become binding? 31. What must be proven in order to make the carrier responsible for baggage? 32. What is *prima facie* proof of such delivery? 33. What is the passenger's duty in regard to the checking of his baggage? 34. In what conveyance must the baggage be carried? 35. When may a passenger receive his baggage, and how long does the carrier's liability continue? 36. What is the duty and liability of a railroad company in regard to the baggage of a passenger to whom it has sold a ticket over its own and other roads? 37. Is the carrier of passengers liable under the same rule as the carrier of goods? 38. To the exercise of what degree of skill, care and diligence does it bind him? 39. How is the rule applied to railroad companies? 40. How must its vigilance be affected by the increase of danger? 41. Give an illustration. 42. Must one have paid his fare to become a passenger? 43. Is he entitled to protection when not on the cars, and where? 44. Are carriers of passengers liable for the negligence of their servants? When? 45. Give an illustration. 46.

What is negligence? 47. When one sues a carrier for personal injuries, what must he show? 48. How is this rule modified in some of the States? 49. How may the carrier of passengers limit his common law liability? 50. Are railroads liable for negligence the same as individuals? 51. What precautions must they take? 52. Is a person negligent who is injured by a train which he can neither see nor hear? 53. Upon what presumption is this true? 54. What are the general liabilities of carriers of passengers by water?

LESSON XLVII.

SHIPPING.

1. Definitions and Explanations. ¹A contract for shipping or of affreightment is an agreement for freighting or carrying goods by water. ²The conveyance may be any craft from the smallest lake or river boat to the largest ocean steamer. ³The parties to the contract are (1) the *owner* of the vessel, and (2) the *shipper* or merchant who owns the goods. ⁴There is sometimes a third party or middle-man who is simply the *charterer* of the vessel. ⁵In this case he has no goods to carry, but hires the vessel from the owner for the purpose of conducting a carrying trade. Usually, however, the shipper himself hires the vessel and in that case he becomes also the charterer. ⁶The contract between the parties involves either (1) the hire of the vessel or a part of it, when it is called the *charter party*, or (2) the carriage of the goods when it is called a *bill of lading*.

2. The Charter Party. ⁷The owner of a vessel may charter it in two different ways, that is (1) he may hire it to one or more merchants reserving possession of and navigating it himself according to the contract, or (2) he may hire it absolutely giving possession to the hirer.

⁸In the first instance the charter party may be defined as a contract of affreightment not usually under seal, by which an entire ship or some part of it is let to a shipper for the conveyance of goods on a particular voyage in consideration of the payment of freight. ⁹In the case of inland waters navigable for only a portion of the year, the contract is often made not for a particular voyage but for *the season*. ¹⁰In this form of the charter party, is usually set forth: 1st. The names of the parties and the name of the ship; 2d. A description of the voyage to be performed; 3d. The covenants, on the part of the owner, as to the good condition and seaworthiness of the vessel; 4th. Particular agreements as to the goods to be carried, reservations of portions of the vessel to the owner, &c. 5th. A statement of the excepted perils for which the owner does not intend to be responsible. These are usually the acts of God, or public enemies, detentions by the sovereign power of any state or government, fire, perils of the sea, and all other unavoidable dangers and accidents; and 6th. The covenants by the charterer to load and unload within a given time, and providing for the amount and payment of freight and *demurrage*. ¹¹The allowance to be made by the shipper to the vessel owner as damages for each day's detention of the vessel at any port beyond the time specified in the charter party, is called *demurrage*.

¹²In the second instance the charter party is a contract whereby the owner lets the vessel to the charterer for a given time or particular voyage and turns over to

him the entire possession of it. ¹³ It is in form quite like a lease, and during the time for which it is chartered the owner has no right to or control over it, but at the end of that time the charterer must return it to him in as good condition as when hired, ordinary wear and tear excepted. ¹⁴ The essential difference between the two forms of charter party arises from the fact that in the former the owner retains possession and in the latter he surrenders it to the hirer.

3. The Bill of Lading. ¹⁵ Where a ship is let wholly or in part to one or more merchants, it is called a *chartered* ship. ¹⁶ Very often, however, the owner himself navigates the vessel, receiving and carrying freight indifferently for all who apply, the same as any other common carrier, in which case his vessel is known as a *general* ship. ¹⁷ The contract between the owner and the shipper pertains, as we have seen, entirely to the conveyance of the goods, and is called a *bill of lading*. It is a written memorandum, signed by the captain or master of the vessel as agent for the owner or charterer, and delivered to the shipper, acknowledging that the goods mentioned in it have been received upon the vessel for transportation. ¹⁸ The shipper who thus sends or *consigns* the goods, is known as the *consignor*, while the person to whom they are sent, is called the *consignee*.

The following is a proper form for a bill of lading, though without the enumeration of the excepted dangers, and the conditions regarding place and manner of delivery, which are now generally included:

Form No. 31.

Shipped in good order and well-conditioned by Jos. M. Blain & Co. on board the sailing vessel F. A. S. called the Condor, whereof Daniel Sweazey is master, now lying in the port of Tacoma, six thousand bunches of cedar shingles being marked and numbered as in the CALLAO margin, and are to be delivered in the like order and condition at the port of Callao (the dangers of the sea only excepted) unto Frederick A. Sherwood, or to his assigns, he or they to pay freight for the said shingles, with ten cents primage and average accustomed.

IN WITNESS WHEREOF, the master of said vessel hath affirmed to three bills of lading each of this tenor and date, one of which being accomplished the others to stand void.

Dated at Tacoma, Wash., the 9th day of December, 1887.

DANIEL SWEAZEY, Master.

4. Use of Bill of Lading. ¹⁹ One of these the master of the vessel retains, while Blain & Co., the consignors, take the other two, and immediately forward one of them to Sherwood, the consignee. When the vessel arrives this bill of lading is evidence of the consignee's right to receive the property. Upon the delivery of the shingles to him, he surrenders the bill of lading to the master in whose hands it becomes an evidence of such delivery.

²⁰ The bill of lading is a symbol of the property, and being properly transferred, it operates as a symbolic delivery of that which it represents. By its terms the property is to be delivered to the consignee or his *assigns* and therefore by assigning the bill of lading to some other person, he transfers his interest in the property to such assignee. ²¹ Bills of lading are transferred by indorsement like negotiable paper, and very often pass through several hands in the course of the payment of business obligations before the consigned property

arrives in port. ²² For example, Sherwood receives the foregoing bill of lading from Blain & Co., and being indebted to Teneyck Depuy, he delivers this bill to him, after writing his name across the back of it. ²³ He may indorse it in blank as he would a bill of exchange or promissory note, or he may indorse it in full by writing above his signature "Deliver to Teneyck Depuy, or order," in which case Depuy would have to indorse it himself if he wished to transfer it; and he must so indorse it when the property is delivered to him.

5. Responsibility for Losses. ²⁴ The owner or charterer of the vessel, as we have seen, is a common carrier, but in his case there is an exception to the general rule of liability of common carriers. ²⁵ He is not liable for damages occurring through certain extraordinary perils of the sea, and this is what is meant by the clause "the dangers of the sea only excepted" in the bill of lading. ²⁶ These dangers include loss by storm, piracy, and fire at sea. ²⁷ The shipper must protect himself against such losses by insuring the property.

6. Maritime Loans. ²⁸ Suppose the *Condor* to have been so damaged by storm that she cannot continue her voyage without putting into port for repairs. This she does at Acapulco, Mexico, but there is no one at that place who knows the master or owners of the vessel or anything about their responsibility. The master must have money immediately for repairs. How shall he borrow it? ²⁹ There are the ship, its accruing freight, and the cargo, but none of these belong to the master, and yet maritime law gives him the power to pledge this property belonging to others, as security for the money required for repairs. ³⁰ If the loan be made upon the vessel and accruing freight, the obligation given for it is termed a *bottomry bond*, but if, upon the cargo, it is called a *respondentia bond*.

7. Nature of the Loans. ³¹ These securities amount to mortgages upon the property, and their payment depends upon the safe arrival of the vessel at her destination. ³² The lender therefore takes a great risk because if the vessel never reaches port he loses the entire amount of his loan, hence maritime loans always bear a very high rate of interest. ³³ These loans are usually made payable a few days after the arrival of the vessel at the end of her voyage. ³⁴ If not paid according to the terms of the bond, the lender may have his loan enforced by due process of law in a Court of Admiralty, and the property sold to satisfy his claim.

³⁵ One peculiarity of bottomry is that where there are successive bonds given, they must be paid in exactly the opposite order from other liens, that is the last one must be paid first, and so on in inverse order. ³⁶ The theory of this is that the last loan enables the ship to complete the voyage, otherwise she would have been lost, and the capitalists who had taken the responsibility of the former loan or loans, would have received nothing, hence each is entitled in the inverse order to what remains after paying the later loan or loans.

8. General Average. ³⁷ Aside from the freight on the goods consigned, the shipper has to make the customary payment of a small sum to the master

for his care and trouble called *primage*. He must also pay charges for towage, &c., and *demurrage* which has been already defined. ³⁸ He is, however, sometimes called upon to pay another charge growing out of the perils of navigation known as *general average*. ³⁹ This arises when it becomes necessary to sacrifice some part of the vessel or the cargo to save the remainder. It is only equitable in such cases that the property saved should bear a proportionable amount of the loss, and this constitutes *general average*. ⁴⁰ The principle embraces every voluntary sacrifice to save property.

⁴¹ It covers the case of a delivery of a part of the cargo as a ransom to pirates or an enemy, where it is necessary to release the ship and balance of the cargo. It also includes the loss caused by cutting away masts and spars, and the throwing overboard of anchors, chains, &c., as well as parts of the cargo. ⁴² Not every sacrifice of property, however, will constitute the ground for general average. It must not be the result of sudden impulse, but a deliberate act resulting from an exercise of the judgment. ⁴³ Goods that are heaviest and of the lowest value should be thrown overboard first. ⁴⁴ The sacrifice must be (1) *necessary*, (2) *voluntary*, and (3) *successful*, that is, it must result in saving the vessel and balance of the cargo.

9. Mode of Adjusting the Loss. ⁴⁵ The general rule is that all articles that pay freight must contribute, and the ship's owners contribute according to the value of the vessel at the end of her voyage, together with her freight and earnings. This may be made more evident by an illustration. ⁴⁶ Suppose the storm, by which we have assumed the *Condor* was damaged during her voyage, to have been, of such severity that the captain was obliged to throw overboard all the shingles shipped by Blain & Co. The vessel which is owned by W. H. Fitch & Co., is worth, at the end of her voyage, \$38,000, and her freight earned is \$2,000, making, as a basis for the owners' contribution \$40,000; Blaine & Co.'s shingles are worth \$8,000, and the balance of the cargo comprises the goods of L. L. Stone, worth \$20,000, and those of G. B. Miller, worth \$12,000. The entire value of the ship, freight and cargo is then just \$80,000, and the amount of the loss, \$8,000, is ten per cent of the whole, which must be borne ratably by the owners and shippers. Fitch & Co. must therefore contribute \$4,000; Stone \$2,000, and Miller \$1,200, making \$7,200, while Blain & Co. must bear the balance of the loss, to wit: \$800 which is their just proportion.

10. Salvage. ⁴⁷ This is the compensation allowed for saving property abandoned at sea. We have seen that the finder of a lost article on land, who takes and returns it to the owner, is not usually entitled to any payment for his services; ⁴⁸ but the compensation for such services at sea is very large, varying according to circumstances and amounting sometimes to half or more of the entire value of the property saved. ⁴⁹ The right to it is not confined to those who find property that has been absolutely abandoned at sea, but rescuers who save vessels from the perils of the sea or from the enemy, are entitled to salvage. ⁵⁰ Many men along the coasts, sometimes called *salvors*, engage in thus rescuing property as a business. ⁵¹ If they fail, they are entitled to nothing for their

services, while, if they succeed, the law allows them liberal compensation out of the property saved. ⁵² Where the amount of salvage is not regulated in any given case by statute, it is fixed by a Court having Admiralty jurisdiction.

⁵³ A person connected as seaman, officer, or pilot, with the ship saved or the cargo of which is rescued, ordinarily has no right to salvage because he is hired and paid for his services in that connection, and can claim no pay for extra exertion. ⁵⁴ A passenger of the vessel may, however, become entitled to salvage, and where the ship has been so abandoned or captured by an enemy as to discharge an officer or seaman from his contract, he may then become entitled to salvage like any other *salvor*.

11. Shipping and Railroad Transportation. ⁵⁵ Since the enormous developments of railroad facilities, the term *shipping* has come to be used in a larger sense and is now frequently applied to simple railway transportation. ⁵⁶ But it is also used in its original sense in connection with carriage by rail, because some of the great railroad corporations have steamship connections which enables them to receive goods at inland stations on the line of their roads and ship them directly to a foreign port. ⁵⁷ In that case the railroad company enters into an agreement with the shipper to deliver his goods at their destination. This agreement is in form a combination of a railroad freight receipt and a bill of lading, and answers the purpose of both. ⁵⁸ Three or more of them are executed in each instance of the same tenor, and these are used, and transferred by indorsement, in the same manner as the bill of lading.

12. The Inter-state Commerce Law. ⁵⁹ On the twenty-second day of March, 1887, there went into effect a law, enacted by the Congress of the United States known as the Inter-state Commerce Law, ⁶⁰ designed to regulate the commerce between the States. Among its provisions were the following:

(1). ⁶¹ That it should apply to all States and territories alike, and should govern the traffic of all common carriers alike, whether on land or water, but not effecting carriers within a State.

(2). ⁶² That no discriminations should be made among large or small, constant or occasional, shippers, or among such as ship articles of greater or less value; that no charge should be unjust or unreasonable; that proper facilities shall be given at termini for other shippers so as to avoid delay, and that *pro rata* charges shall govern in the long and short hauls alike; ⁶³ and all pooling of freights is by the Law declared unlawful.

(3). ⁶⁴ In case of a shipment from one State through a foreign country to another State, the rate must, as in all inter-state freighting, be made public; and if this provision is not observed for such foreign passage, the goods so shipped can only re-enter the United States by the payment thereon of usual duties. ⁶⁵ Besides the requirement for the publication of rates, the law requires that any advance shall be published ten days before being demanded, while reductions in rates may be made without notice, but the fact of such reduction must be posted as soon as made.

(4). ⁶⁶ All schedules of rates and charges must be filed with the Commissioners

together with all contracts, from which no variation without notice can be made, unless subject to a penalty fixed by the law and enforceable in any United States court. ⁶⁷ In determining the justness of complaints against transportation companies, the Commission has the right to subpoena witness and send for persons and papers, and any failure to comply with the demands of the Commission is punishable as a contempt; ⁶⁸ and after finding complaint to be just, notice is given the company charged with injustice, and unless reparation be made, an injunction may effectually restrain the continuance of such abuse.

(5). ⁶⁹ When two thousand dollars or more is involved, either party may appeal to the United States Supreme Court.

(6). ⁷⁰ The Commission may require all corporations of certain classes to employ a uniform system of book-keeping so as to facilitate examinations; ⁷¹ and yearly the Commission reports its business to the Secretary of the Interior.

(7). The object of the law being to prevent abuses, provision was made for its being carried out, ⁷² and appointments made by the president, ⁷³ and expenses paid from the treasury of the United States.

Remark. The bill should be carefully perused by every one interested in shipping.

LESSON REVIEW.

1. What is a contract for shipping or affreightment?
2. What may be the character of the conveyance?
3. Name the two regular parties to the contract?
4. What third party may there sometimes be?
5. What is his position?
6. What does the contract involve and what is it called in each case?
7. In what two different ways may the owner of a *vessel* hire it?
8. What is the *charter party* where the owner reserves possession?
9. For what length of time is the contract frequently made in the case of inland waters?
10. What is usually set forth in this form of the charter party?
11. What is *demurrage*?
12. What is the charter party where the owner surrenders possession of the vessel?
13. What rights does this give the charterer in the use of the vessel, and what duty does it impose?
14. What is the essential difference between the two forms of the charter party?
15. What is a *chartered ship*?
16. What is a *general ship*?
17. What is a *bill of lading*?
18. What are the shipper and the person to whom the goods are shipped respectively called?
19. What use is made of the bill of lading?
20. How does the transfer of the bill of lading affect the goods shipped?
21. In what manner are bills of lading transferred?
22. Give an illustration.
23. How may the bill be indorsed?
24. Does the general rule of liability of common carriers apply to the owner or charterer of a vessel?
25. What is the exception?
26. What is meant by "dangers of the sea"?
27. How must the shipper protect himself against these dangers?
28. Show by illustration how the necessity for a maritime loan may arise.
29. Upon what must the master secure his loan?
30. When is the security given, called a *bottomry bond* and when a *respondentia bond*?
31. What is the nature of these loans and upon what does their repayment depend?
32. Why do maritime loans bear a high rate of interest?
33. When are they

usually made payable? 34. In case of nonpayment, how must the creditor proceed to satisfy his claim? 35. What peculiarity exists in regard to payment where there are several bottomry bonds secured by the same vessel? 36. Upon what theory is this based? 37. What is *primage*? 38. What charge growing out of the perils of the sea is the shipper sometimes compelled to pay? 39. What is *general average*? 40. What does the principle of general average embrace? 41. Name some of the losses it includes. 42. What sacrifices of property will constitute the ground for general average? 43. What goods must be first sacrificed? 44. What must characterize this sacrifice to compel contribution under general average? 45. What articles must contribute in general average? 46. Give an illustration. 47. What is salvage? 48. How large is the compensation sometimes allowed for *salvage*? 49. Does the rescuing of any other property, except that which has been actually abandoned, entitle one to salvage? 50. Who are *salvors*? 51. When are they entitled to compensation? 52. How is the amount of salvage fixed where it is not regulated by statute? 53. Are employees engaged in navigating the vessel usually entitled to salvage in saving the cargo or rescuing the ship? 54. Under what circumstances may they be entitled to salvage? 55. How has the use of the term *shipping* been recently enlarged? 56. How is it used in its original sense in connection with carriage by rail? 57. What is the nature of the contract between the parties in case of such shipment? 58. How is the agreement executed, used and transferred? 59. When did the Interstate Commerce Law go into effect? 60. What was its design? 61. What scope has this law? 62. What is said of discriminations? 63. Of pooling freights? 64. State conditions of foreign shipments. 65. Of charges made. 66. With whom must schedules be filed; and to whom must carrying companies report? 67. In determining the justness of complaints, what powers are given the Commissioners? 68. What may be done if carrier companies on notice, do not repair the wrong? 69. When may parties appeal? 70. What may corporations be required to do? 71. To whom does the Commission make report? 72. By whom were Commissioners appointed? 73. In what manner are the expenses of the Commission paid?

LESSON XLVIII.

INSURANCE.

1. Definitions. ¹ Insurance is a contract of indemnity. ² At common law any person or company might engage in the business of insurance, but, in order to give greater security to those who are insured, the business is now very largely controlled by statute. ³ The contract itself is called a *policy*; ⁴ the consideration or price paid for the insurance is the *premium*; ⁵ the company issuing it is known as the *insurer* or *underwriter*; and the person for whose benefit the policy is issued, is called the *insured*. ⁶ Some companies use the terms *assurance* and *assured*, which mean the same as insurance and insured.

2. ⁷ The Theory of Insurance is really a distribution of loss. ⁸ You own a house upon which you carry an insurance of five thousand dollars, for an annual premium of twelve dollars. Whenever any one of the hundreds or thousands of the other persons insured by the same company suffers a loss, a ratable proportion of your premium goes toward paying such loss. On the other hand, if your house burns, all the other policy holders in like manner, contribute to make good your loss.

3. Insurable Interest. ⁹ The contract being one of indemnity, the person, for whose benefit it is made, must have an insurable interest in the thing insured, that is, he must have such an interest that he may be injured by the risk to which the thing insured is exposed. ¹⁰ Without such an interest the policy would be a mere wagering contract—a bet between the insurer and the insured. ¹¹ This, it will be observed, is called an insurable *interest* because it does not require actual ownership. The interest of a mortgagee, or even of an agent, is sufficient. ¹² This rule requiring an insurable interest in the person for whose benefit the policy is issued, applies to all of the three kinds of insurance mentioned in the next section.

4. Subdivisions. ¹³ The general subject of insurance is subdivided into three main branches, viz.: (1) *Life*, (2) *Fire*, and (3) *Marine*.

LIFE INSURANCE.

5. Definitions. ¹⁴ The contract of life insurance is an agreement to pay a specified sum of money upon the death of a certain person, or when he reaches a certain age. ¹⁵ The parties to the contract are (1) the *insurer*, and (2) the person to whom the money is to be paid on the policy, called the *beneficiary*. ¹⁶ Sometimes a person takes an insurance policy payable to himself, in which case if it be payable at the end of a definite period and he be then living, the

money is paid to him; but if he die before the expiration of the time, or if the policy be payable at his death, then the proceeds are paid to his personal representatives, and become a part of his estate. ¹⁷ In many cases, however, the policy is made payable to some person other than the one insured, and in that case the creditors of the latter have no claim upon the proceeds, nor can he himself dispose of them by will, or otherwise.

6. What Constitutes an Insurable Interest. The application for life insurance usually states the fact that the person applying has an insurable interest in the life of the person sought to be insured. ¹⁸ A person cannot insure the life of another to whom he is a stranger, that is, in whom he has no interest. ¹⁹ A creditor may insure the life of his debtor because he has an interest in it. ²⁰ This interest need not, however, be a direct, pecuniary one. ²¹ A person has an insurable interest in the life of his partner, or one who is engaged in business with him. A wife has such an interest in the life of her husband and a sister in the life of a brother, by whom she is educated and supported. A father has an insurable interest in the life of his minor child; and a woman engaged to be married, has such an interest in the life of her prospective husband. ²² Unlike fire or marine insurance, this insurable interest in life insurance, need not continue. It is sufficient if it exists at the inception of the policy.

7. Fraud and Concealment. The insurer, in consideration of the payment of the specified premium, assumes a certain risk. ²³ The degree of risk he assumes, depends upon many circumstances such as the occupation of the person insured, his physical condition, inherited tendency to disease and the like, and therefore, in order to estimate this degree of risk, the insurer is entitled to have the questions asked, honestly answered. ²⁴ Hence, where a fraudulent representation is made, regarding the matters inquired about which affects the insurer's risk, it will avoid the policy. ²⁵ Where, however, all the questions put to the person applying for insurance have been truly and fully answered, an omission to state facts not called for is not fraudulent. An honest answer to a question is sufficient.

8. Conditions. ²⁶ Where conditions are inserted into the policy or contract, they must be strictly fulfilled. ²⁷ If it be provided that the policy shall become void, in case any annual premium is not paid on the day specified, a failure to make such payment annuls the contract; and even the act of God preventing the payment, will not serve to keep the policy in force. ²⁸ It has, however, been held that the policy is not avoided, where the premium cannot be paid because of the existence of a state of war between the countries in which the insurer and the insured respectively reside.

²⁹ A man's occupation and place of residence affect his chance of life. Hence, where, as is usually the case, the policy contains a condition that the insured shall not reside in certain countries or south of a specified parallel of latitude, or that he shall not engage in certain kinds of business, the policy is annulled by a failure to observe such condition.

The condition very generally inserted in life insurance policies making them

void, in case the insured shall die by his own hand, has caused a vast amount of litigation. ³⁰ It has generally been held that, in order to actually render the policy void under this condition, there must be a criminal act of suicide. ³¹ But an act done by a person deprived of his reason is not his act, and therefore, where the suicide was an insane act of self-destruction, committed while the insured was in such a disordered state of mind as not to understand that his act would cause his death, or that the act was committed under some insane impulse that he could not resist, it has been held not to avoid the policy. ³² Some of the life insurance companies have now made this condition in their policies operative only for a certain specified time, as two or three years, after which the suicide of the insured cannot be interposed as a defense to an action against the company to compel payment.

9. Assignment. ³³ All life insurance policies are assignable like any other chose in action, unless such assignment be forbidden by the statutes of the state. ³⁴ The insurance companies usually establish certain rules regulating the assignment of their policies. ³⁵ This is mainly for the purpose of keeping them informed as to the ownership of policies, and they often provide in the policy itself that it shall be void if it is assigned without the consent of the company. ³⁶ Persons who have insured their own lives for the benefit of themselves, may assign the policies in payment of claims or as collateral security, for their debts and obligations, and they are, in fact, very largely used for the latter purpose in business transactions.

10. Accident Insurance. The business of insuring against the result of accidental injuries has grown into great importance. ³⁷ The policy is a contract of indemnity against bodily injuries effected through external, violent, and accidental means within the intent and meaning of certain conditions annexed to such policy.

³⁸ Accident insurance is done by stock companies which issue regular policies for a specified time, upon payment of a fixed premium. It is also done to a very large extent by mutual companies of which the insured becomes a member. He is then obliged to pay his premium in the form of assessments, sometimes varying in amount, at stated intervals, usually each month; ³⁹ and his policy is avoided and his protection ceases upon a failure to pay such assessments as required by the terms of his agreement.

11. ⁴⁰ The Indemnity usually consists in the payment (1) of a gross sum in case of death and (2) of a weekly payment in case of disability from injury. The money is payable to the beneficiary whether he be the insured or some other person. ⁴¹ The payment in case of death is restricted by a provision to the effect that it shall only be made in case the insured dies within a specified time, usually ninety days, after the injury. ⁴² In mutual companies the gross sum to be paid in case of death depends upon the number of members then paying assessments, although it is ordinarily provided that the amount shall not exceed a sum named in the certificate. In other companies the exact sum is specified in the policy. ⁴³ In the case of a weekly indemnity the amount is stated in the certificate or policy,

and it is provided that in no case shall the payment continue beyond a specified time, usually twenty-six weeks. "Where a beneficiary becomes entitled to payment upon the death of the insured, all sums paid as weekly indemnity on account of disability resulting from the injuries, finally causing death, will be first deducted and only the balance paid.

12. Injuries. "Insurance against injury by accident includes all injuries not excepted by the terms of the policy. "But if the injury is attributable to the negligence of the insured it is not accidental, and the insurer is not bound, as where a passenger negligently puts his arm out of the window of a moving car and his hand is injured by a post standing near the track.

"In case *total disability* is a condition precedent to recovery, it is held that inability to follow one's usual occupation in the usual way constitutes such total disability. For example, a merchant who cannot get about and look after his business as he ordinarily does, though he may be able to keep his books, is totally disabled within the meaning of such condition.

13. Notice of Death or Injury. Notice of death required "as soon thereafter as possible" must be within a reasonable time, which will depend upon the circumstances of the case, and where notice of accident is required to be given within a limited time, a failure to do so will not affect the right to recover, unless it amounts to negligence.

LESSON REVIEW.

1. What is the nature of the insurance contract?
2. At common law who might engage in the business of insurance?
3. What is the contract called?
4. What is the consideration called?
5. How are the parties to the contract designated?
6. What words are sometimes used in place of insurance and insured?
7. What is the theory of insurance?
8. Give an illustration.
9. What interest must the insured have in the property insured?
10. What would the policy be without this interest in the insured?
11. Why is it called an insurable *interest*?
12. Does the rule requiring an insurable interest in the insured apply to all classes of insurance?
13. Give the subdivisions of the general subject of insurance.
14. What is *life insurance*?
15. How are the parties designated?
16. Who receives the proceeds of a policy made payable to the insurer himself?
17. Where a policy is payable to any one, except the insurer, can he himself or his creditors reach or dispose of the proceeds?
18. May a person insure the life of a stranger?
19. May a creditor insure the life of his debtor? Why?
20. Need this interest be a pecuniary one?
21. Give examples of persons having insurable interests in the lives of others.
22. Must this insurable interest continue after the inception of the policy?
23. Upon what does the degree of risk assumed depend?
24. What is the result of a fraudulent representation by the applicant for insurance?
25. Is the omission to state facts not called for fraudulent?
26. What must be done in case conditions are inserted in the policy?
27. How strictly is the rule applied?
28. What will excuse the payment of the premium?
29. What

condition regarding the residence of the insured is usually inserted in the policy and what is the result of a failure to observe it? 30. How is the condition construed, where it renders the policy void, in case of the suicide of the insured? 31. What act of suicide will not render it void under such condition? 32. How have many of the larger companies now modified this condition in their policies? 33. When are life insurance policies assignable? 34. How are these assignments regulated? 35. For what purpose are these rules made by the companies? 36. How are life insurance policies payable to the insurer largely used in business transactions? 37. What is the nature of an accident insurance policy? 38. How does insurance in a stock company differ from that in a mutual company in regard to amount and premium? 39. What is the result of a failure to pay assessments? 40. In what does the indemnity usually consist? 41. How is the payment restricted in case of death? 42. How is the gross sum payable in case of death determined in mutual companies? 43. For how long a time are the weekly payments usually made? 44. What deduction may be made from the payment in case of death? 45. What injuries are included? 46. What is the effect of negligence on the part of the insured? Give an illustration. 47. What constitutes *total disability*? 48. What notice of death or injury is sufficient?

LESSON XLIX.

FIRE INSURANCE.

1. Definition. ¹In this form of the contract the insurer for a certain premium insures the applicant against loss or damage to certain premises by fire, for a specified time and to the amount named in the policy. ²The insurer in some cases reserves the right to repair or rebuild, and so make good the loss of the insured

2. Insurable Interest. ³Reference has already been made in general to the fact that the insurer must have an *insurable interest* in the thing insured, in order to make the contract valid. The law will not enforce a wager policy. ⁴It does not follow, however, that only one person may insure the same property because the law permits the ownership of distinct interests in the same thing, and each owner may protect his own interest by insurance. ⁵Thus the owner of a building, say a *store-house*, having insured it, subsequently mortgages the building, and the mortgagee may insure it to protect his interest; after that the owner enters into a land contract for the sale of the building with a third party who pays him part of the purchase price, and thus obtains an interest in the premises, which he may insure. ⁶A person who is merely entitled to the rent or occupancy of premises may insure them. ⁷The total of the insurable

interests cannot amount in any case to more than the value of the premises. Hence when the owner mortgages his property his interest in it is decreased by the amount of the interest acquired by the mortgagee under his mortgage; and this is illustrative of the effect of every division of interests.

3. The Policy. ⁸This, as we have seen, is the contract between the insurer and the insured. ⁹The business of insurance is done by large companies, each having its own printed policy, and therefore it is not thought advisable to insert a form of policy here. Each policy usually contains a large number of conditions and restrictions which the insured assents to by accepting it. It is interpreted and enforced like any other agreement. ¹⁰In this contract the minds of the parties must meet in regard to the following essential elements, viz.: (1) the premises and risk; (2) the amount insured; (3) the time the insurance is to continue, and (4) the premium.

4. (1) The Premises. ¹¹The policy must contain a description of the premises insured. ¹²This usually includes a statement of the facts relating to the material of the building, the means of heating and lighting, the material of which the roof is composed, the title or interest of the insured, the liens existing upon it, to what use it is put, its distance from other buildings, and of what material such adjacent structures are composed; and if it be personal property that is to be insured, then its nature and value, the manner in which it is disposed of, and the nature and character of the building in which it is contained; and in either case what, if any, other insurance is in existence covering the same property.

5. ¹³The Risk is ordinarily the danger of loss or damage by fire; ¹⁴and to this is often added a clause insuring against lightning, and recently in some of the western states it has become quite common to insert a provision protecting the insured against loss or damage resulting from tornados and other storms. ¹⁵The protection against loss or damage by fire includes not only the loss resulting from the actual work of the fire, but also all damage caused in putting out or controlling the fire. The damages caused by the use of water in such cases are often greater than those resulting from the actual burning. ¹⁶If there be no clause in the policy insuring against lightning, there will be no protection for the insured against damages resulting from that cause, unless the property or building be actually set on fire by the lightning.

¹⁷In the absence of fraud the law only regards the immediate cause of the loss, so that even though the owner were guilty of gross negligence in permitting the fire, yet this would not relieve the insurer from liability for the loss.

¹⁸Insurance companies usually introduce into their policies a clause, excepting them from liability for damages resulting from fire caused by "invasion, foreign enemy, or any military or usurped power whatsoever," and sometimes adding also "or by riot or civil commotion."

6. Change of Risk. ¹⁹A policy of insurance being issued upon the basis of a certain degree of danger, for which the insured pays a premium designed

to be proportioned to the risk, it follows that if the danger be increased, the risk, and therefore the premium must be correspondingly greater. ²⁰ If then the insured does anything whereby the hazard of the insurer is increased without his consent, it amounts to a change of the contract which will render it void.

²¹ Any alteration in the building insured by way of additions or repairs, and in its surroundings by the erection of other structures, changes the risk, and may, if it be thus increased, make the policy void. So does a change in the occupancy, ownership, or use of the building; ²² and in the case of personal property the changing of its location. ²³ The insured in all such cases should therefore have the consent of the insurer to any changes or alterations of that kind.

²⁴ The mere fact, however, that more hazardous articles are occasionally on the premises, will not affect the policy.

²⁵ Where a building is insured to be used in carrying on a particular business, the insured is at liberty to use the ordinary materials in its prosecution. ²⁶ The insurer is supposed to be acquainted with the business.

7. (2) Amount Insured. ²⁷ The amount for which an insurance policy is issued is merely a *maximum*, that is the largest amount for which the company can be made liable. ²⁸ It is a full protection to the property to the amount of the policy. ²⁹ If the loss be the same or less in amount, it is paid in full; but if it be greater, no matter how much greater, the owner will receive under his policy no more than the amount named in it.

³⁰ For example, if a building worth \$3,000 and insured for \$2,000 is damaged by fire, to the extent of \$2,000, or any less sum, the insured will receive the amount of his actual loss, but if the building be totally destroyed, he can recover only \$2,000. In case the owner suffers a partial loss, and the company pays him any sum less than the full amount for which it had insured the property, the policy continues in force only as to the balance for the remainder of the time. Thus, if in the preceding example the building were damaged, to the amount of \$500, which the company paid, it would only be liable under that policy for subsequent loss to the extent of \$1,500.

³¹ Buildings may be, though they are not usually, valued or appraised before insurance, but where this is done without fraud, and the amount agreed upon by the parties, both insurer and insured will be bound by it. ³² The company cannot afterward, in case of loss, show that the premises were of less value. ³³ In insuring personal property on the other hand, it is not unusual for the parties to agree upon what shall be considered its value in case of loss.

8. Insurance in other Companies. ³⁴ Most insurance companies will not issue a policy above a certain fixed sum, which differs in the different companies, and they will issue only one covering the same property. ³⁵ Hence, if one owns a valuable building, he must ordinarily insure it in several different companies, in order to protect his interests. ³⁶ In such a case, if the building be damaged by fire to the amount of all the insurance, then each company must pay the full amount of its policy. ³⁷ On the other hand, if the loss be less, then each company pays that proportion thereof, which the amount of its policy bears to the whole amount of the insurance. ³⁸ For example, a building is insured in one

company for \$2,000, in another for \$6,000, and in a third for \$10,000. A fire damages the premises to the extent of \$9,000; the first company must pay \$1,000, the second \$3,000, and the third \$5,000, while, if the loss had been \$18,000, each must have paid the full amount of its policy. "This rule is not affected by the relative dates upon which the policies were issued. If one had been in force one year at the time of the fire and another one day, the liability of the companies would not be varied by that fact.

"So far as the owner is concerned, he need not usually resort to all the companies for their proportionate share, but if any one policy is sufficient to cover his loss, he may collect the full amount from the company which issued it. "In that case, however, the company, paying the full amount of loss, may collect from the other companies that have outstanding policies covering the property destroyed their ratable shares. "The same rule of contribution applies, as in the case of co-sureties. "Some companies have a condition embodied in the policies, providing that in case of loss, the insured shall not receive, on such policy, any greater proportion of the damage sustained than the amount thus insured, shall bear to the whole amount of insurance on the same property. "In that case the insured must comply with the condition, and can only collect from the company its proportion of the loss.

LESSON REVIEW.

1. What does the insurer undertake to do in the contract of fire insurance?
2. What reservation does the insurer sometimes make?
3. What interest must the insurer have in the thing insured?
4. How is it that more than one person may insure the same property?
5. Give an illustration.
6. May a person who is merely entitled to the rent of premises insure them?
7. What is the limit of the aggregate of all the insurable interests in any property?
8. What is the *policy*?
9. By whom is the business of insurance conducted?
10. What are the essential elements in the contract of insurance?
11. Must the policy contain a description of the premises?
12. What does this description usually include?
13. What is the ordinary risk?
14. What other dangers are sometimes included?
15. What does the protection against loss or damage by fire include?
16. If there be no clause insuring against lightning, when will its effects be covered by the ordinary fire policy?
17. Will gross negligence of the insured in permitting fire relieve the insurer?
18. What clauses are usually introduced into the policy, excepting the insurer's liability for loss?
19. How is the premium related to the degree of danger?
20. What effect upon the contract has an increase of the danger without the consent of the insurer?
21. Show by illustration what circumstances will have this effect?
22. In case of personal property?
23. What precaution that more hazardous articles are occasionally on the premises avoid the policy should the insured take in case he desires to change the risk?
24. Will the fact that more hazardous articles are occasionally on the premises avoid the policy?
25. Where a building is insured for a particular business, what materials may be used?
26. What supposition arises in that case in regard to the insurer's

knowledge? 27. What may the amount for which the insurance is issued be said to be? 28. To what extent is the policy a protection to the property? 29. How much will the insured receive, in case of loss? 30. Give an illustration. 31. What is the effect of an appraisal before insurance? 32. May the company, after a loss, show that the premises were of less value? 33. Is it usual to make an appraisal in case of the insurance of personal property? 34. Do companies usually have a limit to the amount for which they will insure any single building? 35. How then must the owner of a very valuable building protect his interest in it? 36. In that case what does each company pay where the loss equals or exceeds, the full amount of insurance? 37. What, in case the loss is less than the full amount of insurance? 38. Give an illustration. 39. Is this rule affected by the relative dates of the policies? 40. Must the owner collect from each company, its proportionable amount of the loss? 41. What right has the company from which he has collected the full amount of the loss, against other companies? 42. In what other case does the same rule of contribution apply? 43. What condition do some companies include in their policies regarding payment in case of partial loss where there is other insurance? 44. How does this affect the insured?

LESSON L.

1. (3) The Time the Insurance is to Continue. ¹This is always particularly specified in the contract even to the exact hour of the day, which is usually twelve o'clock, m. ²Fire insurance policies are ordinarily made for one, two or three years, but occasionally they are made for longer or shorter periods. ³It is the custom of insurance agents to notify their patrons of the expiration of policies held by them. ⁴When the term of a policy expires and the holder desires the same protection continued, the agent either issues an entirely new policy or attaches to the old one a renewal. ⁵This renewal is a brief contract executed by the proper officers of the company acknowledging receipt of the premium and in consideration thereof, in terms renewing for a specified time the former policy, which is usually referred to and described by its number. These renewals like the policies are printed forms provided in all cases by the company.

2. Surrender of Policies. ⁶Most, if not all, insurance companies now permit their policies to be surrendered at any time, and repay to the holders a certain percentage of the premiums. ⁷This repayment of premiums is made upon a fixed scale, and is somewhat less than the proportionable amount for the unexpired term of the policy. ⁸The amount which a company will pay for an unexpired policy is called its *surrender value*.

3. (4) The Premium. ⁹The amount which is paid for insurance is the

premium. It is the consideration upon which the company undertakes to protect the owner's interest in the thing insured, and is always stated in the policy.¹⁰ Its amount varies with the risk, and is supposed in each case to be exactly proportioned to the probabilities of loss from fire or other cause against which protection is given.

4. Representations. ¹¹ Statements made in an application for fire insurance and not embodied in the policy are mere *representations*, and if substantially correct, the policy will be valid. ¹² But if such representations made by the insured to the insurer are material to the risk, and are false and fraudulent, the policy may be avoided at the election of the insurer. ¹³ And this is true, although the representation is not, in fact, material to the risk; yet is material in the judgment of the insurer, and induced the taking of the risk. Such fraudulent representations have been held to avoid the policy.

¹⁴ An omission to state a fact bearing on the risk where no inquiry is made, and no fraud is practised, will not render a policy void.

5. Warranties. ¹⁵ A warranty, as it is understood in the law of insurance, must be a part of the contract, and in this lies its main difference from a representation. ¹⁶ The same statement or description in the contract would be a *warranty*, and outside of it a *representation*. ¹⁷ The term *warranty* need not be used, and ordinarily is not, but the statement or description which constitutes the warranty must be distinctly set forth in the contract. ¹⁸ It may be written in the policy, or attached to it, or even be upon a separate paper, which is referred to and identified in the policy and made a part of it. ¹⁹ It is in the nature of a condition precedent to the validity of the policy, for if it be not true the policy will be invalid. ²⁰ The description of a building as a store-house is material to the risk, and is deemed a warranty that it will be used as such, and therefore by devoting the building to a more hazardous business; the warranty is broken and the insured thus suspends the policy. ²¹ And where a description of the property embodied in the contract is inapplicable to the premises, the policy does not take effect.

6. Conditions. The simple contract of insurance may be expressed in few words, but the ordinary insurance policy is a formidable document; and when read, as it ought always to be, and occasionally is, it appears, to be composed mostly of conditions. ²² Each one of these is construed as a distinct warranty, and must be literally complied with. ²³ For example, when the policy contains a condition that the insured shall give the insurer notice of any prior or subsequent insurance upon the property, this amounts to a warranty that he will do so, and in case subsequent insurance be procured upon the property, and the required notice is not given the former policy becomes void.

²⁴ These conditions very often included the classification of property and also of the uses to which it is put, as *not hazardous*, *hazardous* or *extra hazardous*.

²⁵ The specific condition in insuring a building is frequently that it shall not be used for certain trades or for storing certain goods whereby the risk is increased under the above classification. ²⁶ That is, if the risk be denominated *not hazard-*

ous, then the policy would be avoided by so using the premises as to make the risk *hazardous* or *extra hazardous*.²⁷ But a condition prohibiting "storing and keeping hazardous articles" is not broken by a mere casual placing of such articles in the building. Nor is the keeping and using of such articles in the course of repairs upon the premises, a breach of the condition.

7. Assignment of Policy or Property. ²⁸Fire policies usually contain a provision which renders them void in case the policy or the property is assigned or transferred. ²⁹This condition applies during the continuance of the risk. After the loss the claim is assignable. ³⁰A complete transfer of the property itself without the policy deprives the insured of his insurable interest which destroys the contract, because, as we have seen, unlike life insurance, the insurable interest in the insured is not only essential at the inception of the policy, but it must continue through its whole term.

³¹The legal effect of a transfer of the property in avoiding the insurance may, however, be prevented by the consent of the insurer. ³²It is quite customary where a person sells premises covered by an insurance policy that would not expire for some considerable time, for him to agree with the purchaser to repay to him a proportionate part of the premium advanced, and continue the insurance. ³³Then, instead of having his policy cancelled, and receiving the surrender value of it, as he must otherwise do (p. 213, sec. 2), he goes to the agent of the company and has the policy *transferred*. ³⁴This is done without objection, and as a matter of course, the agent usually adding to the policy the following words, or those of a similar import, to wit: "Title to the above-described property now in (*purchaser's name*), and this insurance for his benefit."

³⁵Where the insured does not transfer the premises entirely, but only an interest in them, as where he gives a mortgage upon the property, and it is agreed that the buildings shall be insured for the benefit of the mortgagee, the insurer may have his policy transferred in such a manner that in case of loss the mortgagee will be first paid the amount of his claim, and the balance, if any, the company will pay to the insured himself. ³⁶This is done by the addition of a clause to the policy, by the agent of the company, in these or similar words: "Loss, if any, payable to A, B, mortgagee, as his interest may appear."

8. Reinsurance. ³⁷The insurer has an interest in the preservation of the property, and may, therefore, reinsure it. In this way a company may, if it choose, entirely relieve itself of the risk, or may share it with another company. ³⁸The party originally insured has no interest in the new policy. ³⁹In case of loss the first company must pay the insured and collect from the other insurer.

9. Loss. ⁴⁰The damage for which the insurer is liable under a fire policy may result, as we have seen, not only from the actual burning, but from the use of water in extinguishing the flames. It may also be caused by the excessive heat of the fire; and the damage may even be the result of fire in adjoining premises.

⁴¹The insurer is not relieved from liability even if the loss occurs through the negligence of the insured. Most fires do in fact result from negligence, and

against the possibility of this the insurer seeks to be protected. ⁴² But this is only the case where there is no fraud. ⁴³ If the insurer burns, or attempts to burn, his buildings in order to secure the insurance, it would be an attempt to commit a fraud and would prevent his recovery. ⁴⁴ And in case of fire, he must do all within his power to save the property, or he will not be protected by his policy.

10. Adjustment of Loss. ⁴⁵ Where the policy contains no valuation of the property insured, the actual value of the property at the time of the loss determines the insurer's liability. ⁴⁶ No increase or decrease of its value, caused by some unforeseen circumstance, can be taken into account; neither can any damage or inconvenience resulting to the insured or his business, by reason of being deprived of the use of the building injured or destroyed. ⁴⁷ If, however, the parties have valued the property in the contract, then, as we have seen, this constitutes the basis for determining the loss.

11. Proceedings on Adjustment. ⁴⁸ Where the policy requires a notice of the loss, this condition must be substantially complied with as a condition precedent to a recovery from the company. And if it is provided that the notice or certificate of loss shall be made under oath by the insured, compliance with the terms of such provision is indispensable. ⁴⁹ False and fraudulent statements as to the amount of loss in this certificate will destroy the right of the insured to recover, the same as such false representations made in procuring the policy.

LESSON REVIEW.

1. How is the time of the continuance of the insurance specified? 2. For what length of time are fire policies ordinarily made? 3. What is the custom of insurance agents in giving notice of the expiration of policies? 4. How does the insurer continue the protection to the insured? 5. What is a *renewal*? 6. May the insured surrender his policy? 7. Does the company repay a proportionable amount of the premium in case of surrender? 8. What is meant by the *surrender value*? 9. What is the *premium*? 10. How does its amount vary? 11. What are *representations*? 12. What representations will avoid the policy? 13. When will they so avoid the policy, although it is not in fact material to the risk? 14. What omission to state facts will not render a policy void? 15. What is a *warranty*? 16. Distinguish between warranty and representation. 17. Need the term warranty be used? 18. In what manner may the warranty be incorporated into the policy? 19. How is a warranty a *condition precedent* to the validity of the policy? 20. Is the description of the building a warranty, and what may constitute a breach of such warranty? 21. What is the effect when the description is inapplicable to the premises? 22. How are conditions in the policy construed? 23. Give an illustration showing the effect of a breach of the condition against other insurance. 24. What classification of property do these conditions often include? 25. What is the specific condition frequently introduced in a policy under this classification? 26. Illustrate its application. 27. What storing

and use of hazardous articles will not avoid the policy? 28. What provision is usually included in a policy in regard to the transfer of the property insured? 29. How long does this condition apply? 30. Why does a complete transfer of the property destroy the contract? 31. How may the legal effect of such transfer be avoided? 32. What custom exists in regard to transferring the policy in case of the sale of the premises? 33. Who makes this transfer? 34. How is it made? 35. What course is often pursued in case of the mortgaging of the premises insured? 36. In what way does the agent indicate the mortgagee's interest in the policy? 37. Has an insurer an insurable interest in the property covered by his policy? 38. Has the insured any interest in the reinsurance policy? 39. In case of loss, to whom must he look for indemnity? 40. For what damages is an insurer liable under a fire policy? 41. Does the negligence of the insured discharge the insurer? 42. When does it not discharge the insurer? 43. What effect has it on the policy when the insured burns or attempts to burn the building? 44. In case of fire, what must he do in order to be protected by his policy? 45. Where there is no valuation in the policy, upon what basis is the insurer's liability determined? 46. May a change in the value of the premises, caused by unforeseen circumstances, be taken into account? 47. What is the rule where the property has been valued in the policy? 48. What must be done where the policy requires notice of loss? 49. What effect will false statements concerning the amount of the loss have when embodied in the certificate?

LESSON LI.

MARINE INSURANCE.

1. Definitions. ¹Marine insurance, like fire insurance, is a contract of indemnity. ²By it the insurer agrees to indemnify the insured against certain perils to which his ship, freight, cargo and profits, or some of them, may be exposed during a certain voyage, or for a definite time. ³The parties are the same as in life or fire insurance, though the insurers are more generally called *underwriters* than in the other classes.

2. Insurable Interest. ⁴As in the other classes of insurance, the insured must have an insurable interest in the property covered by his policy, or it will not be valid; and further than that, as in fire insurance, this interest must exist at the time of the loss. Any person having an actual interest in the property, or a lien upon it, may insure. ⁵The rule is that any person may be said to have such an interest who may be injured by the risk to which the property insured is exposed. ⁶A creditor who has loaned money on bottomry or respondentia bonds has an insurable interest in the ship or cargo. ⁷The interest which an

insurer acquires by the risk taken gives him the right to reinsure the property. ⁸This is often done, as in fire insurance, where the insurer wishes to relieve himself from a portion of the responsibility, or he may do it as a matter of profit, which results in case he reinsures at a lower premium than he received from the owner.

3. The Property Insured. ⁹As the definition implies, the ship, freight, cargo and profits may be insured. ¹⁰Where the insurance covers the body of the ship, it includes also, unless there be some agreement to the contrary, all that belongs to it, and is necessary and proper, in the course of its navigation. ¹¹The freight which is insurable is the remuneration to be paid to the ship owner for the hire of his vessel. ¹²This is held to include the benefit an owner would derive from carrying his own goods in his own vessel. ¹³The property insured must be so described that it may be identified, and where this is done, a mere mistake in the description will not affect the validity of the policy. ¹⁴The rule is that where the ship is specified, it becomes a part of the contract, and the cargo cannot be transferred to another vessel without avoiding the policy, unless it is done from *necessity*.

¹⁵As is the case with contracts in general, the subject matter must be lawful. ¹⁶If the illegality exists at the commencement of a voyage, it will continue throughout illegal. ¹⁷Such would be the case if a voyage were undertaken to land goods or carry on trade in violation of an embargo or the provisions of a treaty. ¹⁸It is well settled that an insurance is void which covers property intended to be shipped contrary to the laws of the place where the contract is made or sought to be enforced. ¹⁹If, however, the voyage were originally lawful and afterwards became illegal, this would not release the insurer from liability, provided the loss be not in any way connected with the illegality.

4. The Risk. ²⁰In marine insurance, the risk includes all extraordinary hazards of a sea voyage. ²¹The policy usually contains a considerable list of these perils, among the most important of which are *perils of the sea, fire, piracy, theft, capture, arrest and detention, barratry, general average and salvage*.

²²The expression, *perils of the sea*, is meant to include the risks of navigation, such as those resulting from storms, collisions, rocks, reefs, etc.

²³The loss by *fire* includes, as in fire insurance, all damage resulting from the use of water and other means and appliances for extinguishing or staying the flames.

²⁴*Piracy and theft* cover all losses by robbery or thieving. This does not generally include theft committed by persons who were lawfully on board the vessel.

²⁵*Capture, arrest and detention* are usually combined into a single phrase, and refer to the acts done under authority of some government, as where the ship is captured by a man of war belonging to a hostile nation. ²⁶*Barratry* is any breach of duty committed by the master of the vessel or the seamen, without the consent of the owner, by reason of which the ship or cargo is injured. Sailing out of port without paying port duties, or engaging in smuggling, are acts of barratry. ²⁷*General average and salvage* have already been explained (p. 200, 201, secs. 8, 10).

5. The Duration of the Risk. This depends strictly upon the agreement as expressed in the policy. ²⁸It is sometimes a specified time, as a month or a year, or it may be for a particular voyage. Where the time is specified, the policy, as in fire insurance, states the exact day and hour when it begins and ends; ²⁹and it is sometimes provided by a special clause that, in case the vessel should be upon the ocean when the date fixed for its expiration arrives, the insurance shall nevertheless continue until she reaches port.

³⁰When the insurance is for a particular voyage, such voyage must be accurately determined and described. ³¹This requires a statement of the time and place of the beginning and end of the voyage, and all intermediate ports at which the vessel may touch. ³²In case the vessel unnecessarily deviates from a course thus prescribed, the insurer is discharged from liability for loss. ³³Even touching at one port in place of another, both being equally in the way of the vessel, has been held such a deviation as to render the policy void. ³⁴Where, however, the deviation is rendered *necessary* by stress of weather, need of repairs, or to avoid capture or detention, it will not discharge the insurer. A deviation from the course in order to save life is under a moral compulsion, and will not avoid the policy.

³⁵A policy of insurance upon the cargo covers all risks until the goods are actually landed.

6. The Amount Insured. ³⁶This may be agreed upon in advance by the parties to the insurance, who settle upon a valuation which is included in the policy. This makes what is known as a *valued policy*. ³⁷The effect of such a valuation is to establish the basis upon which to calculate the proportion of any loss for which the insurer will be liable. That is, the insurer only pays the whole loss where the valuation is the same as the amount of the policy. But, if the goods be insured for a portion of their valuation, then the insurer must pay only that proportion of the loss represented by the ratio which the amount of the policy bears to the valuation. ³⁸For example, if the cargo be valued at \$10,000 and insured for \$5,000, and the loss amounted to \$8,000, the insurer would be liable to pay \$4,000; and if the loss were \$2,000, he would pay \$1,000, that is, in any event he must pay one half of the loss. ³⁹By insuring for half or any other fraction of its value, the owner is held to be himself the insurer of the remainder of the cargo. ⁴⁰This is very different from the rule in case of valuation in fire insurance policies (p. 211, sec. 7).

⁴¹An *open policy* is one in which there is no valuation of the thing insured. Under such a policy the value of the cargo or ship in case of loss must be determined by evidence, and it must be the value at the time the insurance was effected. While the value remains the same throughout the voyage, it is the interest of the insured at the time of the loss which determines the right of recovery.

7. Assignment of the Thing Insured. ⁴²As we have seen (p. 199, sec. 4), goods conveyed by a vessel may change ownership one or more times and be transferred by symbolic delivery before they are actually received. ⁴³In order to permit this without the consent of the insurer, a certificate is sometimes issued by the company, which may be transferred from one owner to another with the

title to the goods without effecting the validity of the policy, and in case of loss, payment will be made to the final holder of this certificate.

8. Warranties. "The stipulations on the part of the insurer are termed warranties; and a warranty is considered either *affirmative* or *promissory*. "It is *affirmative* when it describes the ship or cargo, and *promissory* when the insured undertakes to perform some act or thing, as that the ship shall sail by a given day, or be manned in a particular manner. Such warranties are called *express*, and, as in fire insurance, they must form a part of the policy. "Such a warranty becomes a condition precedent, and must be performed, or there is no valid contract; and the performance must be strictly literal, no matter whether it be material or not.

"There are also certain *implied* warranties as that the ship shall be seaworthy when she sails, and that she shall be properly manned and navigated. These implied warranties embrace all that is essential to the general safety of the vessel. "Any breach of these warranties of seaworthiness at the commencement of the voyage will discharge the insurer from responsibility for loss. "It is only the *extraordinary perils*, as we have seen, which are covered by insurance. "The ordinary perils must be guarded against by the seaworthiness of the ship, and its proper navigation.

9. Disclosure and Concealment. "The insured is bound to disclose every fact within his knowledge which may affect the determination of the insurer to issue or refuse a policy, or his decision in fixing the amount of the premium. A failure to do this will avoid the policy. "And the same result will follow the positive misrepresentation of any fact material to the risk. "The *concealment* or suppression of a fact which is material and continues until the risk begins, discharges the insurer.

10. Abandonment. "This is a relinquishment to the insurer by the insured of all his interest in the portion of the thing insured, which has been saved. "Of course there is no such thing as abandonment in case of total loss, and the right to abandon may only be exercised by the insured when the loss has exceeded one half of the subject-matter of the insurance. "When the conditions give the insured the right of abandonment, he may exercise it or not as he chooses; "but the insurer has not an equal liberty, for he cannot refuse to take the property, and thus be relieved from the payment of any part of the loss. Abandonment cannot be revoked by the insured after it has been accepted by the insurer. "The object of abandonment is to enable the insured to collect the whole value of the property insured. "Insurance is sometimes effected by agreement between the parties without right of abandonment, in which case a statement to that effect is embodied in the policy.

11. Adjustment. The adjustment of marine insurance losses is rather a complicated matter involving as it does general average, salvage and various other allowances. "It is generally done by persons who make it a business or profession. "Ordinarily the loss is adjusted at the first port of discharge reached after it occurs.

12. Return of Premium. ⁶² The insured may dissolve the contract before any risk has been incurred by electing not to ship the goods, or not to commence the voyage. ⁶³ In this case he may have the premium returned to him. He may also have it returned, provided there has been no fraud on his part, where the contract of insurance proves to have been void from the beginning, as from the failure of a warranty.

LESSON REVIEW.

1. In what respect is marine insurance like fire insurance? 2. What does the insurer undertake to do in the policy of marine insurance? 3. What are the parties called? 4. What interest must the insured have in the thing insured? 5. Who may be said to have an insurable interest? 6. Give an illustration. 7. May the underwriter reinsure his risk? 8. For what purposes may he wish to do this? 9. What property may be insured? 10. Where the insurance covers the body of the ship, what does it include? 11. What is the *freight* which is insurable? 12. May the freight be insured, where the ship owner carries his own goods? 13. How must the property insured be described? 14. Upon what ground may the cargo be shifted from the vessel specified in the policy? 15. Must the subject-matter of the insurance be lawful? 16. What is the effect of illegality at the commencement of the voyage? 17. What would constitute such illegality? 18. What is the effect upon the insurance of shipping goods contrary to law? 19. When will a subsequent illegality not avoid the policy? 20. What does the risk include in marine insurance? 21. Name some of the perils contained in the policy? 22. What is meant by *perils of the sea*? 23. What does the loss by *fire* include? 24. What does the indemnity against piracy and theft cover? 25. What is meant by *capture, arrest and detention*? 26. What is the meaning of *barratry*? 27. Define general average and salvage. 28. For what time are policies made? 29. What provisions are sometimes made for the expiration of a policy while a ship is at sea? 30. When is an accurate description of the voyage necessary? 31. What does such a description require? 32. What is the effect of an unnecessary deviation from a prescribed course? 33. Give an illustration of such deviation. 34. What deviation will not avoid the policy? 35. How long does a policy on the cargo protect it? 36. What is a *valued policy*? 37. What is the effect of such a valuation? 38. Show by illustration, in case of loss, the effect of insuring for less than the valuation. 39. Where a policy covers only a part of the value of the cargo, who is held to be the insurer of the remainder? 40. How does the rule of partial insurance in a marine policy differ from that in a fire policy? 41. What is an open policy? 42. May goods in transit be transferred? 43. What method is adopted in order to avoid the necessity of procuring the consent of the insurer to such transfer? 44. What are warranties and how are they divided? 45. When is a warranty *affirmative* and when *promissory*? 46. How does such a warranty affect the policy? 47. What are some of the implied warranties in marine insurance? 48. What is the effect of a breach

of any of these warranties ? 49. What perils are covered by insurance ? 50. How are the ordinary perils guarded against ? 51. What is the insurer bound to disclose ? 52. What result will follow a positive misrepresentation of any fact material to the risk ? 53. What concealment will discharge the insurer ? 54. What is *abandonment* ? 55. When may the right of abandonment be exercised ? 56. Must the insured exercise this right when the circumstances permit it ? 57. May the insurer accept the abandoned property or not as he chooses ? 58. What is the object of abandonment ? 59. In what cases does the right of abandonment not exist ? 60. By whom is the adjustment of marine losses generally effected ? 61. Where are such losses ordinarily adjusted ? 62. How will it affect the policy where the goods are not shipped or the voyage commenced ? 63. When may the insured have the premium returned ?

LESSON LII.

LIEN.

1. Definitions and Explanations. ¹ Lien is, in brief, a right of detention. It is the right which one person has to retain possession of the property of another until the price, or some charge due upon it, is paid. ² This assumes possession of the property by the person exercising the right of lien. ³ Such possession, either *actual* or *constructive*, is necessary to the creation and continuance of the lien, except under maritime law, and in some cases where it arises from particular contracts. ⁴ It follows, therefore, that parting voluntarily with the possession, divests the party of his lien.

⁵ The debt in reference to which the lien is claimed must be due to such claimant in his own right, and not as an agent of another.

2. How Created. ⁶ A lien may be created in three different ways, viz: (1) *by law*, (2) *by usage*, and (3) *by agreement of parties*.

1. *By law.* ⁷ A lien is said to be created by law, where it exists by virtue of the *common law*, or is given by *statute*, or recognized by *maritime law*.

2. *By usage.* ⁸ This arises only where usage has become so general, that a contract may be implied between the parties permitting the lien. They are presumed to be acquainted with the usage.

3. *By agreement of parties.* ⁹ Parties who are competent to make any lawful contract, may agree to create a lien. ¹⁰ Nor is a positive agreement necessary for that purpose. ¹¹ A mere notice given in advance by the person receiving the goods to the owner is sufficient.

3. Kinds of Liens. ¹² Liens are usually divided into two kinds, viz: (1) *General*, and (2) *Particular or Special*. ¹³ A *General lien* is the right which a creditor has to detain any property of his debtor as security for a general balance due on account. ¹⁴ These liens belong particularly to factors and agents to whom their principals become indebted on general account in the course of their dealings. Attorneys have this lien upon all papers and securities in their hands, belonging to their clients. ¹⁵ This kind of lien is not favored by the law, and is strictly construed in its application to any given case.

¹⁶ A *Special or Particular lien* gives the right to retain only the particular thing on account of which the claim, thus sought to be secured, arose. ¹⁷ A warehouseman who takes a piano for storage, has a lien upon it for his charges; and a machinist who receives a traction engine for repairs, has a lien upon it for the value of his labor and material. ¹⁸ There may be, however, in all such cases, some agreement or understanding between the parties which will preclude the attaching of a lien in some particular case.

4. Persons Entitled to Liens. ¹⁹ Two classes of persons are in general entitled to the right of lien under the common law, viz: (1) ²⁰ those who may be compelled to receive the property for storage, transportation, or other legal purpose, such as common carriers, innkeepers, etc.; and (2) ²¹ those who by their own capital or labor have changed the character or quality of the property by authority of the owner, as where a carriage maker repairs a broken wheel or straightens a bent axle. ²² These general classes include the following special classes of persons whose liens are among the most important, and the most frequently exercised, viz.:

1. *Bailees* who perform labor and services upon the thing bailed at the request of the bailor, their lien upon the property is for their charges which may be for repairs, storage, etc.

2. *Innkeepers* having a lien upon the baggage of a guest, for the amount of his bill.

3. *Common Carriers* having a lien upon the goods carried by them for their freight and disbursements.

4. *Vendors* having under some circumstances a lien upon the goods sold by them for the payment of the price.

5. *Agents* and *factors* who have a lien upon the property of their principals for advancements made for their benefit.

5. How Waived. We have seen that the right of lien may be waived by agreement of the parties, and by a voluntary surrender of the property. ²³ And this may result indirectly from an agreement which is inconsistent with the right of lien, as where a factor makes an express stipulation, on receiving the goods, to pay over the proceeds. ²⁴ The right of lien may also be waived by neglect to assert it. ²⁵ One who refuses to deliver property upon demand, claiming to hold it on some other ground than by virtue of his right of lien, is held to have thereby waived such right of lien by neglecting to assert it. ²⁶ The lien is also lost by a new agreement between the parties whereby the debt secured by the lien is to be paid in some other or different manner.

6. Enforcement of Lien. ²⁷ Where a lien is created by statute, provisions are usually made also for its enforcement, that is, means are provided to enable the holder of the lien to realize the amount of his claim out of the property. And in general the method of enforcement is adapted to the nature of each particular class of liens. In some cases these have been already given.

LESSON REVIEW.

1. Define *lien*.
2. What does this assume?
3. What kind of possession may it be?
4. What is the result of a voluntary parting with the possession?
5. To whom must the debt be payable?
6. How is a lien created?
7. When is a lien said to be created *by law*?
8. When *by usage*?
9. When *by agreement of parties*?
10. Is a positive agreement necessary?
11. What notice is sufficient?
12. How are liens divided?
13. What is a general lien?
14. What classes of persons are entitled to a general lien?
15. Is this lien

1 favored by the law, and how is it construed? 16. What is a special lien?
17. Give illustrations. 18. How may the attaching of this lien be prevented?
19. How many classes of persons are entitled to the right of lien under the com-
mon law? 20. Who constitutes the first class? 21. Who constitutes the
second class? 22. What special classes of persons entitled to important liens
do these general classes include, and for what in each case is such lien a security?
23. How may the right of lien be waived indirectly, and how illustrated? 24.
How otherwise may the right of lien be waived? 25. Give an illustration.
26. In what other way may the lien be lost? 27. What is meant by the
enforcement of a lien, and how is it provided for?

LESSON LIII.

INTEREST AND USURY.

1. Definitions. ¹Interest is the compensation paid for the use of money.

²In early ages, it was considered unjust to demand payment for the use of money and the taking of interest was prohibited by law. There is, however, no sound reason why a man who loans a hundred or a thousand dollars is not as much entitled to compensation for the use of it, as a liveryman is for the use of a team and carriage, or a music dealer for the rent of a piano. ³The sum loaned is called the *principal*; and upon this interest is reckoned ⁴at a certain rate *per centum*—usually abbreviated to *per cent.* or expressed %—which means *by the hundred*. ⁵Where the agreement states no time the law will presume that the rate mentioned is *by the year*, ⁶but it is not unusual in formal contracts to specify the rate at so much *per cent. per annum*. ⁷Hence, where one thousand dollars is loaned at six per cent, it means that the lender is to receive from the borrower each year as interest six dollars on every one hundred loaned. ⁸The term interest is employed strictly within the limits of the definition given above, and does not include profits derived from money invested in business enterprises.

2. Legal Rate. ⁹In nearly all our States there is what is known as a *legal rate* of interest, which means the rate fixed by the statute of the particular State.

¹⁰This is the rate which the law will presume was intended where the contract itself is either silent as to the rate or merely contains the words *with use* or *with interest*. ¹¹In some States the legal rate, while it will be presumed to be the one intended where no other is mentioned, yet as between the parties it is the *maximum* that is the highest rate allowed by law. The parties may agree upon any lower rate, but the law will not permit them to stipulate for a higher rate. ¹²In some States the legal rate and the *maximum* rate are not the same, the latter being much higher than the former. Where this is the case, while the law will always presume the legal rate to have been intended in the absence of any agreement, yet the parties may stipulate for any higher rate up to the maximum. In a few States there is no limit to the rate which may be agreed upon by the parties.

3. On What Allowed. ¹³The classes of claims upon which interest is allowable may be divided into (1) those in which it is provided for in the contract, (2) those which consist of debts that have become due and remain unpaid, and (3), those in which an agreement for its payment is implied.

¹⁴(1) Contracts containing provisions for the payment of interest, embrace nearly all loans made in the usual course of business. ¹⁵These are ordinarily represented by promissory notes or bonds which include such expressions as *with*

use, or with interest thereon, amounting in each case to an absolute agreement to pay interest.

¹⁰ (2) The second class includes all claims that are not paid according to the terms of the contract under which they arise, that are not paid when due. ¹⁷ For example (p. 71, sec. 8), Hayes sells Clark property and takes his note due in three months, without interest. If Clark pays the note when due he simply pays the face of it, but in case he should fail to thus pay it, he would not only be liable for the eight hundred and fifty dollars, but for interest thereon at the legal rate from the maturity of the note until the date of payment. This is sometimes held not to be interest, strictly speaking, but a *penalty* for the nonpayment of the money, which the law fixes at the legal rate.

¹⁸ (3) The third class of claims comprises all those in which the agreement to pay interest is implied. ¹⁹ For example, where one sells goods for cash, if the purchaser delays paying for them, an agreement is implied on his part to pay interest on the purchase price. And where one advances money for another, as in the payment of freight or expressage by a commission merchant upon goods consigned to him, an agreement to pay him interest is presumed, in case the shipper knew that such was the usage of the business.

4. ²⁰ **Usury** means illegal interest. Hence, when formerly the receiving of any compensation for the use of money was forbidden by law, all interest was *usury*. Owing to this fact and to the violent prejudice which underlay the law, the word *usury* has retained something of its ill repute with the curious survival to some degree of that prejudice which made it odious. ²¹ The taking of any higher rate of interest than that allowed by the law of a State constitutes usury within that State, but as the rates allowed by statute are not at all uniform throughout the country, the same rate is often usurious in one State and legal in another.

— 5. **Nature of the Contract.** ²² The agreement for unlawful interest must be made with a corrupt intent, and the interest must be reserved or agreed upon at the time the contract is made. ²³ A subsequent agreement for usury will not affect the original debt. ²⁴ For example, a note drawing a legal rate of interest falls due, and the holder accepts in its place another, which is usurious, the original note or debt is not affected and can be collected, although the new note may be absolutely void by statute.

²⁵ As we have seen, interest is a compensation for the use of *money*, and usury is illegal interest, hence it follows that *usury* must grow out of a loan of *money*. Various expedients have been resorted to for the purpose of escaping the usury laws. ²⁶ Sometimes the loan of money is coupled with the sale of other personal property, as where one loans a specified sum of money at the legal rate, provided the borrower will take certain goods or chattels at a fictitious valuation, that is, pay the lender enough more than their actual value so he will be in effect receiving usury on his loan of money. ²⁷ The presumption is that every such transaction is merely a cover for the usurious agreement.

²⁸ The agreement must include a positive promise to repay the principal sum unconditionally. ²⁹ If, as we shall see, the repayment of the principal depends

upon some contingency, then the rate of interest, though above that fixed by law, will not be usurious.

6. Compound Interest. ³⁰An agreement in advance for the payment of compound interest, or interest upon interest, will not be enforced, although it is not usurious. ³¹But an agreement after interest has accrued, to pay interest thereon, is valid and in some states such an agreement will be presumed. ³²And money actually paid for compound interest cannot be recovered by the borrower, unless it was so paid as the result of an error in including it in the computation of the interest.

7. Other Payments not Usurious. ³³The payment of interest in advance, as in discounting a note at a bank, is not usurious. ³⁴Nor will the payment to an attorney for his services in making the loan, or to a broker for securing it, constitute usury.

A loan is not usurious where its repayment depends upon the happening of some uncertain event, no matter what the agreed rate of interest may be. This is illustrated in the case of bottomry and respondentia bonds (p. 217, s. 2). ³⁵The payment of these securities depends upon the safe arrival of the ship in port. If the ship be lost the lender never receives either principal or interest.

³⁶The sale of any security like a bond or note, which is a valid obligation in the hands of the seller for less than the face of it, is not usurious; ³⁷but such a transaction would be void for usury if the note were given for the purpose of being thus negotiated.

8. Effects of Usury. ³⁸Wherever the law has fixed a *maximum* rate above which all interest is usurious, some penalty is imposed upon the lender who takes usury. ³⁹It varies in the different States, and sometimes in the same State as between individuals and banking institutions, but usually subjects the lender to some one of the three following degrees of loss, viz.: (1) the loss of all interest above the lawful rate; (2) the loss of all interest, or (3) the loss of both principal and interest. ⁴⁰The lender suffers these losses in most instances because the law will not assist him to collect his claim, ⁴¹and therefore the borrower may profit by the usury in not being obliged to pay his debt or some part of it. ⁴²Ordinarily, if the obligation has been paid with usurious interest, the borrower cannot recover any part of it, but in some States the law will compel the lender to repay the usurious interest. ⁴³Beyond this, in some cases, the lender is liable to indictment or fine, for taking usury.

⁴⁴But the effect of usury extends beyond the original debt, for where the principal contract is usurious, all subsequent securities given to enforce it are rendered void. ⁴⁵Where a usurious loan has been made, a transfer of valid securities to the lender as collateral security for payment of such loan, is void: and he cannot enforce them even against the maker. ⁴⁶The securities, however, are not themselves rendered void, and hence may be enforced in other hands.

LESSON REVIEW.

1. Define *interest*. 2. Has the taking of interest always been legal? 3. What is the sum loaned called? 4. How is *per centum* usually abbreviated, and what does it mean? 5. What will be presumed as to the time for which the rate is given where it is not specified? 6. How is it often specified in formal contracts? 7. Give an illustration. 8. Within what limits is the term interest used? 9. What is meant by *legal rate*? 10. What is meant by the expressions *with use* or *with interest* embodied in a contract? 11. May the parties stipulate for a lower interest than the legal rate? 12. May they ever agree upon a higher rate? 13. Upon what classes of claims is interest allowed? 14. How general is the first class of claims? 15. Mention some of them. 16. What is the second class? 17. Give an illustration. 18. What is the third class of claims? 19. Give illustrations. 20. Define *usury*. 21. May legal interest in one State be usurious in another? Why? 22. What must be the nature of the agreement for usury, and when made? 23. Will a subsequent agreement for usury affect the contract? 24. Give an illustration. 25. Out of what kind of a loan must usury grow? 26. What expedients have been resorted to, to evade the usury laws? 27. What presumption arises in regard to all such transactions? 28. What positive promise must the agreement include? 29. What is the effect where the repayment of the principal depends upon some contingency? 30. Will an agreement for compound interest be enforced? Is it usurious? 31. When is an agreement to pay interest upon interest valid? 32. May money paid for compound interest be recovered by the borrower? 33. Is the payment of interest in advance usurious? 34. Is the payment to an attorney or broker for services in making or securing a loan usurious? 35. Is the high rate of interest in bottomry and respondentia bonds usurious? Why? 36. Is the sale of a security for less than its face value ordinarily usurious? 37. When is such sale usurious? 38. What is the general effect of usury? 39. Give the three degrees of loss to which the lender is usually subjected as a penalty for usury? 40. In what way does the lender suffer these losses? 41. May the borrower profit by the lender's loss? 42. If a lender has paid usurious interest, may he recover it? 43. Is the lender ever liable to any other punishment for taking usury? 44. In what way does the effect of usury extend beyond the original debt? 45. What is the effect of transferring valid securities as collateral to a usurious loan? 46. Are the securities themselves rendered void?

LESSON LIV.

DOMESTIC RELATIONS.

1. Definitions. ¹The body of rules governing the rights and relations of the members of the household or family, as distinguished from those of the individual, constitutes the law of *domestic relations*. ²This determines their right to contract marriage, and defines the reciprocal relation of parent and offspring. The subject, therefore, reaches to the very foundation of what we call society, and hence this body of law is inferior in importance to no other. ³The ordinary divisions of the subject are as follows, viz:

1. Marriage.
2. Husband and wife.
3. Parent and child.
4. Guardian and ward.
5. Divorce.
6. Master and servant.

⁴The subject of *INFANCY* is sometimes treated in this connection, but it more properly belongs elsewhere, and has already been sufficiently considered for the scope of this work (pp. 18-19).

2. The Contract of Marriage. ⁵Marriage is a divine institution, and is the parent, not the child, of civil society, but a discussion of it in that light would fall within the domain of social philosophy. ⁶We have to do with it here only as a contract. ⁷It may be observed that the word is often used with reference to the relation itself after the contract is formed; a discussion of it in that sense will be had under subsequent sections of this title. ⁸The contract of marriage is the agreement whereby a man and woman covenant to unite for life — to assume the relation of marriage.

3. Conditions of the Contract. ⁹The validity of a contract of marriage depends upon four necessary conditions, viz:

1. Parties legally capable of marrying.
2. The consent of the parties.
3. Conformity to the law of the place.
4. The assumption of the marriage relation.

4. Legal Capacity. We have seen that persons who are under any natural or legal disability, cannot make a valid contract (p. 17, sec. 1). ¹⁰This applies with equal force to the contract of marriage. ¹¹The parties must be a man and woman without legal or natural disqualifications.

5. Incompetent Persons. The disabilities rendering persons incompetent to enter into the contract of marriage, or assume the marriage relation, are,

- | | | |
|--|---|---------------------------------|
| 1. ¹² Natural Disabilities, | { | 1. Idiocy. |
| | | 2. Lunacy. |
| | | 3. Drunkenness. |
| 2. ¹³ Legal Disabilities, | { | 1. Consanguinity and Affinity. |
| | | 2. Infancy. |
| | | 3. Physical Incapacity. |
| | | 4. Prior marriage, undissolved. |
| | | 5. Diverse civil conditions. |

6. Natural Disabilities. ¹⁴An idiot, lunatic, or a person in such a condition of drunkenness that he has no use of his reason, can no more contract a valid marriage than enter into any other binding contract, and the discussions already had upon these disabilities (p. 17, secs. 3-5) are equally applicable here.

7. Consanguinity and Affinity. ¹⁵Consanguinity refers to disqualifications by reason of blood relationship. ¹⁶This disqualification applies to marriage between persons related in the lineal, or ascending and descending lines. Nature abhors it; the Divine law forbids it. ¹⁷The disqualification of affinity applies to marriage between a husband and his wife's kindred, and between a wife and her husband's kindred. When contracted within the forbidden degrees of kinship, it is equally null and void as in case of consanguinity. ¹⁸What degree of affinity shall disqualify persons from contracting marriage has been debatable ground. ¹⁹Most of the States have enacted laws upon the subject, to which the student is referred. ²⁰An example of the difference of opinion which obtains, is found in the contest which has been going on for many years in England to legalize the marriage of a husband with his deceased wife's sister.

8. Infancy. ²¹Infancy is not a bar to marriage to the same extent as in ordinary contracts. We have seen that a minor cannot make a valid contract except for necessities (p. 18, sec. 6, and p. 19, sec. 10). ²²By the rule of the common law, adopted from the Roman, a certain period was established, called *the age of consent*, which was fourteen in case of males and twelve for females. ²³When a marriage was contracted by parties, either of whom had not arrived at the age of consent, it might be avoided at the election of the party under such age. ²⁴In England it seems to have been held that even the other party, though of full age, might also disaffirm the marriage, but in this country the better rule is that the party who has arrived at the age of consent is bound by the marriage. ²⁵In this country the various States have enacted statutes fixing the age of consent. ²⁶Some of them have retained the common law limit, as stated above, while others have fixed upon ages ranging upwards from fourteen for females and eighteen for males. ²⁷Disaffirmance of the marriage after one or both of the parties have reached the age of consent, may be by, or without, a judicial decision; ²⁸and likewise it may be affirmed, without a new ceremony. ²⁹A continuance of the relation of husband and wife will amount to an affirmance.

9. Physical Incapacity. Physical incapacity, existing at the time of the marriage, is a recognized cause of disqualification.

10. Prior Marriage Undissolved. ³⁰ In all Christian countries it is a well established rule that a marriage between parties, one of whom is bound by an existing marriage tie, is void. ³¹ It is a crime. It was once tolerated in one of the territories of the United States though never sanctioned, but it has now even there been made a criminal offense. ³² Such marriages are termed polygamous, if either of the parties is bound by more than one former tie, and bigamous, if bound by only one. ³³ No length of separation is sufficient to authorize a second marriage, though it may relieve the offender from a criminal charge. ³⁴ Nothing but the dissolution of a marriage by a competent court will authorize either party to contract a second.

11. Diverse Civil Conditions. ³⁵ Race, color and social rank were not common law grounds for disqualification. ³⁶ But in this country, the laws in many States gave no recognition to marriage between slaves, and between slaves and free persons, and between persons of opposite color. ³⁷ Such marriage is called *miscegenation*. With the disappearance of slavery and the extension of equal political rights, the tendency is to do away with these grounds of disqualification.

12. Mutual Consent of the Parties. ³⁸ To constitute a valid marriage contract, there must be the free and full consent of both parties. ³⁹ Therefore, if either party enters into the contract under the influence of force or fraud, the marriage is absolutely void. ⁴⁰ It can be ratified upon the discovery of the fraud or when the party is left free to act. ⁴¹ Force implies a physical constraint of the will. Fraud implies the practicing of some deception whereby the will is misled.

13. Conformity to the Law of the Place. This refers to the formal celebration of the marriage. ⁴² It is the general rule that a marriage which is valid where celebrated is valid everywhere. ⁴³ In some States there is an absence of civil requirements; and it is there sufficient for the parties to agree to take each other for husband and wife. ⁴⁴ This agreement may be in express words, with or without witnesses. ⁴⁵ Or, it may be implied from the acts of the parties, as by assuming the relations of husband and wife. ⁴⁶ In other States, a formal celebration by a magistrate or minister of the Gospel is required, and very frequently a license must first be procured and other regulations observed. In some States, the consent of parents or guardians must be procured if the parties are not of full age.

14. The Assumption of the Marriage Relation. ⁴⁷ Upon the conclusion of the marriage contract, the parties must assume the relationship of husband and wife, and live together as by the contract they agree to do. ⁴⁸ An immediate and continued refusal of either party to do so, is a ground for avoiding the marriage.

LESSON REVIEW.

1. What constitutes the law of *domestic relations*? 2. What does it determine and control? 3. What are the ordinary divisions of the subject? 4. What other division is sometimes included? 5. How is marriage considered as an institution? 6. In what way are we to consider it here? 7. How is the word otherwise used? 8. What is the contract of marriage? 9. Upon what conditions does the validity of the contract depend? 10. What persons cannot make a valid contract of marriage? 11. Who are the parties to the contract? 12. What are the natural disabilities rendering persons incompetent to enter into the contract of marriage? 13. What are the legal disabilities? 14. Why may not idiots, lunatics and drunken persons marry? 15. What is meant by the disqualification of consanguinity? 16. To marriage between what persons does this apply? 17. To what marriage does the disqualification of affinity apply? 18. Have there been differences of opinion as to the degree of affinity which should disqualify persons from marrying? 19. How is it governed in the different States? 20. How are these differences of opinion illustrated? 21. Is infancy a bar to marriage to the same extent as in ordinary contracts? 22. What was the age of consent under the common law? 23. What is the effect of a marriage contracted under the age of consent? 24. How has the law in England differed from that in this country regarding the effect of such a marriage upon the party above the age of consent? 25. How has the age of consent been fixed in the various States? 26. How has the age of consent varied under the statutes of the different States? 27. How may such marriage be disaffirmed? 28. May it be affirmed without a new ceremony? 29. How? 30. What is the general rule regarding marriages in which one of the parties is already bound by an existing tie? 31. Is such marriage a crime? 32. What marriages are called polygamous and what bigamous? 33. Will any length of separation authorize a second marriage? 34. What dissolution of a marriage will authorize a party to marry again? 35. Did diverse civil conditions disqualify persons at common law from marrying? 36. How has this provision of the common law been abrogated in this country? 37. What is marriage between persons of opposite color called? 38. What consent is necessary to constitute a valid marriage? 39. What is the effect upon the marriage where either party enters into the contract under the influence of force or fraud? 40. May such marriage be ratified? 41. What is the meaning of *force* and *fraud* as used in this connection? 42. What is the general rule regarding the validity of marriage? 43. How may marriage be contracted in States in which there is an absence of civil requirements? 44. How may this agreement be made? 45. How may it be implied? 46. What formalities are required in some States? 47. Must the parties assume the marriage relation? 48. What is the effect of an immediate and continuous refusal to do so?

LESSON LV.

1. Rights and Disabilities of the Wife. ¹ Under the common law, the effect of the marriage was to take from her the right to contract, and all her property became vested in her husband. ² But, as we have seen, (p. 19, sec. 11) the common law has been greatly modified, leaving, in many States, the wife free to make contracts and carry on business, and also enabling her to keep her antenuptial property. ³ Her services belong to her husband and in the absence of statutory enactment she is not entitled to her separate earnings.

2. Duties and Liabilities of the Husband. ⁴ The husband is bound to support the wife in a manner befitting her station in life and according to his means. ⁵ If he refuses or neglects to do so and she is without fault, she may purchase necessities for her support, and he becomes liable for the price. ⁶ Under the common law he was liable for her debts contracted before marriage, but this rule scarcely obtains now, being quite universally abrogated by statute. ⁷ If the husband and wife are not living together and the separation is without the wife's fault, then she may bind him in contracting for necessities. But not so if she forsake him. ⁸ If she wilfully leave her husband, without his fault, he is not liable for any debts she may contract. ⁹ To escape liability it is usual for him to give public notice of the fact of such desertion.

3. Duties of Parents to Children. ¹⁰ There are three leading duties of parents as to their children: (1) to protect; (2) to educate; (3) to maintain. ¹¹ The protection means both personal and legal. ¹² The education refers to both intellectual and moral training. ¹³ The maintenance must correspond with the parents' station in life and their wealth and income. ¹⁴ These obligations primarily rest upon the father. ¹⁵ If he is not living, then the mother takes his place. ¹⁶ In case of her lacking means, support will be drawn from any property belonging to the child. ¹⁷ The obligation to support the child exists only so long as the child accepts the support provided at home. ¹⁸ If the child abandon home, without the fault of the parent, then the parent is not liable for the child's support or necessities. ¹⁹ If, by reason of the parent's cruelty or failure to provide a home or failure to properly provide for the child at home, the latter is thrown upon the world, the parent is liable for the necessities for its support. ²⁰ The child is not entitled to its separate earnings. ²¹ They belong to the parent unless by express agreement or tacit consent, the parent gives the child its time, or emancipates it, as the legal phrase is.

4. The Rights of Parents. ²² The parents have the right to demand obedience, and to inflict chastisement for disobedience. They are entitled to the custody of the child. ²³ According to the common law, the father, if living, had the paramount right to the custody of the child. ²⁴ Equity has interfered in modern times, and the tendency is to give the mother more authority over the child, especially if such child be very young. ²⁵ In this country, it is in the

discretion of the courts of justice to withdraw the custody of a child from the father and confer it upon the mother, according as the morals, or safety, or interests of the child seem to require.

5. The Duties of Children to Parents. ²⁶ Natural justice demands that the child revere and obey the parent, ²⁷ but there is no legal obligation, under the common law, resting upon the child to support the aged or indigent parent, however great the moral obligation. ²⁸ To prevent the burden falling upon the public, however, many States have enacted that children having the means, shall be compelled to contribute to the parents' support and the poor-master or warden or officer exercising such duties, may enforce such contribution from the child.

6. Relation of Guardian and Ward. ²⁹ In its strictly legal sense, the relation of guardian and ward is that existing between a person appointed by a court of competent jurisdiction to care for the person, or the person and property of one whom youth or mental weakness disqualifies from attending to the affairs of life. ³⁰ The person appointed is the *guardian*, and the person whose interests are entrusted to him is the *ward*.

7. Classes of Guardians. Guardians may be classed as follows :

- | | | |
|---|---|--|
| ³¹ 1. With respect to authority. | { | 1. Guardians of the person.
2. Guardians of the property.
3. Guardians of the person and property. |
| ³² 2. With respect to the kind of ward. | { | 1. Guardians of minors.
2. Guardians of lunatics, idiots, spend-thrifts and habitual drunkards. |
| ³³ 3. With respect to the source of appointment. | { | 1. Statutory guardians.
2. Testamentary guardians. |

³⁴ Each of these classes, as we shall consider them, presupposes the orphanage of a minor ward or the incompetency of an adult. ³⁵ There are guardianships recognized by the common law called guardianships by nature and nurture. These are nothing more nor less than the natural right of parental control possessed by the parents, and the right belongs exclusively to the parents—first to the father and, upon his death, to the mother. This form of guardianship has largely fallen into disuse in this country, and so has guardianship in socage, which was wont to arise when a minor under fourteen became possessed of real estate.

8. Guardians with Respect to Authority. ³⁶ A guardian of the person is entrusted only with the care of the ward's person, and has about the same authority over the ward's conduct, maintenance and education as a parent, and is sometimes called a "temporary parent." ³⁷ A guardian of the property is entrusted only with the conduct of the ward's business affairs, and is accountable to the court for the proper management of the ward's estate. It is usual to combine the office of guardian in a guardian of both person and property.

9. Guardians with Respect to the Kind of Ward. ³⁸The guardians of minors are the most numerous of this class. ³⁹Guardians of lunatics, idiots, spendthrifts and habitual drunkards are frequently designated by the term "committee." ⁴⁰They are appointed in cases where the ward, by reason of mental weakness or confirmed dissolute habits, is incompetent to manage his own affairs.

10. Guardians with Respect to the Source of Appointment. ⁴¹In nearly if not all States, there are statutes regulating the appointment of guardians by the courts or judges in proper cases, and such are called statutory guardians. When it becomes necessary to appoint a guardian for a minor, it is frequently provided that the minor, if above the age of fourteen, may select the guardian. ⁴²The testamentary guardian is appointed by will, and upon the death of the father the appointment becomes absolute. In most States, the right to appoint a guardian by will rests only with the father.

11. Divorce. ⁴³Divorce is the formal annulment of a marriage contract by a court of competent jurisdiction. ⁴⁴There are two kinds of divorce :

1. Absolute divorce.
2. Limited divorce.

12. ⁴⁵Absolute Divorce is, in law, termed divorce *a vinculo matrimonii*, meaning a divorce from the bonds of matrimony. ⁴⁶It is an absolute release to the party obtaining it, and in some States to both parties, from the marriage tie itself and all the resulting obligations. ⁴⁷There is a wide diversity in the statutes of the various States with reference to the causes which will authorize a court to grant an absolute divorce. In New York and many other States an absolute divorce is granted only on the ground of adultery. ⁴⁸Some States make abandonment a cause. ⁴⁹This diversity and the consequent conflict of law renders apparent the need of a national law regulating divorce.

13. ⁵⁰Limited Divorce is a legal separation without dissolution of the marriage tie. ⁵¹It is often referred to as *judicial separation*. ⁵²Various circumstances may authorize it, such as desertion, and cruel and inhuman treatment. ⁵³The decree of separation usually provides for the payment to the wife by the husband of a stated periodical allowance or of a gross sum for her support, called *alimony*. ⁵⁴The amount is determined with reference to the husband's means and income and the wife's station in life. ⁵⁵The chief distinction between the absolute and the limited divorce lies in the fact that in case a limited divorce is granted, neither party can marry again while the other lives; but the party obtaining an absolute divorce is free to contract a second marriage, while the one for whose offense it is granted is, in some States, forbidden to marry again during the life time of the other. ⁵⁶The court will not interfere to grant either a limited or an absolute divorce when both husband and wife are at fault and both have broken the marriage vow.

14. Annulment of Marriage. At the beginning of this subject (p. 230, sec. 3), we saw what were the essential conditions of a marriage contract. ⁸⁷It may be said in general that a contract of marriage in which one of those essential conditions is wanting is voidable. ⁸⁸For instance, a minor contracting marriage before having arrived at the age of consent may seek to have a court set it aside or annul it upon arriving at age. ⁸⁹The marriage is binding, however, until a court has annulled it by due process of law. ⁹⁰There was a time, however, when certain marriages were held absolutely void from the beginning. ⁹¹The tendency of modern times is to consider the contract voidable only, that is subject to annulment. ⁹²*Annulment of marriage*, then, is the dissolution of the marriage tie because some one of the conditions essential thereto, as we have discussed them, has been lacking. ⁹³Divorce presumes a lawful and valid marriage. ⁹⁴Annulment takes place in case of a voidable marriage.

15. Master and Servant. The relation of master and servant is not strictly a domestic relation, although usually treated under that head. ⁹⁵There was formerly a large body of law actively employed by the courts in regulating the relation of master and servant, but at this day, especially in the United States, since the abolition of slavery, the subject has become one of minor importance. ⁹⁶The old and time-honored practice of apprenticing by articles of apprenticeship has largely gone into disuse, and all servants now enter into a contract of hiring as fully as any other contract. ⁹⁷They are bound to serve until the termination of the contract, and the master is likewise bound to keep them and pay them stipulated wages. They can only be discharged for cause, and likewise they cannot quit the master's service except for cause, without rendering themselves liable to damages, but in this case, as in all others, minors are not bound by their contracts. ⁹⁸The master is responsible for the wrongs committed by the servant, unless such wrongs be willfully committed, and is responsible to the servant for injuries received in the service arising from the master's negligence, but not for injuries arising from the negligence of a fellow servant. ⁹⁹The servant is accountable to the master for gross negligence in the care of the master's property and conduct of the business intrusted to him.

LESSON REVIEW.

1. What is the effect of marriage under the common law upon the wife?
 2. To what extent has that been modified? 3. To whom do the wife's services belong? 4. What is the husband bound to do? 5. What is the result of his refusal to perform his duty in this respect? 6. For what is he liable under the common law? 7. When may a wife living apart from her husband bind him by her contract for necessities? 8. When, under such circumstances, is he not liable for her debts? 9. What is usually done in order to escape liability for the wife's debts? 10. How many and what are the leading duties of parents to their children? 11. What *protection* is required? 12. What is meant by education in this connection? 13. And

what by maintenance ? 14. Upon whom do these obligations primarily rest ? 15. When is the mother bound to perform these duties ? 16. When will support be drawn from the child's property ? 17. How long does the obligation to support the child exist ? 18. What effect has the abandonment of home by the child without the fault of the parent ? 19. What effect has such abandonment where it is caused by the cruelty of the parent or his failure to provide for the child at home ? 20. Is a child ordinarily entitled to its separate earnings ? 21. When is the child entitled to such earnings ? 22. What rights have the parents in regard to their children ? 23. At common law, which parent was entitled to the custody of the children ? 24. How has equity varied this rule ? 25. In this country, what discretion have the courts in regard to the custody of children ? 26. What duties does natural justice demand for parents from children ? 27. Are children legally obliged at common law to support aged parents ? 28. What laws have been enacted in some States legalizing this duty ? 29. What is the relation between guardian and ward ? 30. Which is *guardian* and which *ward* ? 31. Give the classes of guardians with respect to authority. 32. With respect to the kind of ward. 33. With respect to the source of appointment. 34. What does each class presume ? 35. What are the guardianships recognized by the common law ? 36. With what is a guardian of the person entrusted ? 37. With what is a guardian of the property entrusted ? 38. What guardians are most numerous in the second class ? 39. How are guardians of lunatics, etc., sometimes designated ? 40. What is the necessity for their appointment ? 41. What is meant by a *statutory guardian* ? 42. What by a *testamentary guardian* ? 43. What is divorce ? 44. How many and what kinds of divorce are there ? 45. What is *absolute divorce* called in law, and what is the meaning of the expression ? 46. What is its effect ? 47. Are the causes for absolute divorce uniform in the different States ? 48. Is *abandonment* a sufficient cause ? 49. What need is made apparent by this diversity ? 50. What is *limited divorce* ? 51. How is it otherwise referred to ? 52. What are some of the circumstances authorizing limited divorce ? 53. What does the decree of separation usually provide ? 54. Upon what basis is the amount to be paid by the husband determined ? 55. In what lies the chief distinction between absolute and limited divorce ? 56. When will the court not grant either a limited or absolute divorce ? 57. What marriages are voidable ? 58. Give an illustration. 59. How long is a voidable marriage binding ? 60. Have any marriages ever been held absolutely void ? 61. What is the modern tendency in regard to such marriages ? 62. Define *annulment* of marriage ? 63. What does divorce presume ? 64. What marriages are annulled ? 65. What change has taken place regarding the law governing the relation of master and servant ? 66. How is the relation between master and servant now created ? 67. State the duties of servants to their masters and masters to their servants. 68. How far is the master responsible for the acts of the servant ? 69. For what is the servant accountable to the master ?

LESSON LVI.

REAL PROPERTY.

1. Definitions and Explanations. ¹ Real property, or *real estate*, as it is often called, has been already defined (p. 12, sec. 6). ² From that definition it is apparent that real property includes all minerals, oil, and water below the surface, as well as everything that is upon and affixed to it, and all these pass with the transfer of title from owner to owner. ³ So strict is this rule, which includes in real property everything of a permanent nature attached to the soil, that if a person erects a building on the property of another, or affixes to the soil, or builds into another building any other structure, it will usually belong to the owner of the land. ⁴ Of course the person's interest may change this by agreement, and in some cases such an agreement will be presumed.

⁵ *Appurtenances* is a word frequently used in connection with real property, and means something belonging to the particular premises described, as the keys of a house, fences, a windmill, or gates.

2. Rights to Real Property. ⁶ In England the title to all real property was supposed to have been originally in the king, who granted much of it in parcels to his subjects. ⁷ But these grants were not absolute; they were made upon condition that the holders should always stand ready to render the king their services in time of war, both personally and by providing men and supplies for his armies. ⁸ These powerful subjects, subdivided their estates, and allotted the land to large numbers of smaller proprietors who then became their *vassals*, upon substantially the same condition of service as that under which they themselves held. ⁹ This interest of a vassal was called a *feud*, and hence the system which grew out of the practice of such allotments was known as the *feudal system*. ¹⁰ Feud was also called *fief*, and from this came the word *fee*. ¹¹ In England when a feud, fief, or fee was granted to an individual unconditionally, it was termed a simple fee, or a *fee simple*, that is, it was a conveyance without restrictions; and the words are used in substantially the same sense at the present time, both there and in this country. ¹² The same principle is applied in this country, and it is held that all individual titles to land have been derived since the Revolution from the government of a state or of the United States. ¹³ The title thus derived is absolute, except that in all cases the right of *eminent domain* is reserved to the Government or the State. This is the right to take individual property from the owners for public uses upon paying them, or causing them to be paid, a just compensation.

3. Kinds of Rights. ¹⁴ The right or interest which a person has in property, particularly real property, is called an *estate*, as an estate in *fee simple*, an *estate for life*, or an *estate in reversion*. These rights, or estates, are numerous, and some of them very difficult of comprehension. Only a few of the more important will be here considered.

4. Estate in Fee Simple. ¹⁵ This as we have seen, is equivalent to full ownership of the property. The owner therefore, possesses it absolutely, subject only to the right of eminent domain. As it is sometimes said, he owns downward to the center of the earth and upward without limit. No one may come upon it without his consent, and he may use all necessary force in removing and keeping off a trespasser. ¹⁶ He may use it in such way as he chooses, provided he does not thereby cause injury to others or to their property. ¹⁷ He may sell or give it away, and in case he does not dispose of it during his life, or by will at his death, then upon his decease the title passes at once, by operation of law, to his heirs, who take it in fee simple as he owned it. ¹⁸ But if he had no heirs, the property would *escheat*, that is, it would fall back to the original owner, viz: the State.

5. Estate for Life. ¹⁹ The owner of an estate in fee simple, being at liberty to do what he chooses with it, may, as it is sometimes said, carve out of it other and lesser estates. ²⁰ For example, A owning an estate in fee simple, may transfer it to B to be held by him during the life of A the grantor, or B the grantee, or during the life of any third person, in which case B has what is termed an *estate for life*. ²¹ The owner of such an estate has a right to the full enjoyment and use of the land and all the profits arising from it. ²² But he has no right to destroy or waste the property by cutting down timber, unnecessarily destroying buildings or fences, or otherwise doing anything not necessary to his enjoyment of the premises and which inflicts a permanent injury upon them. ²³ His interest being only for life, the owner of the balance of the estate is entitled to be protected from such *waste* and the law will interfere to prevent it.

²⁴ The life owner cannot of course sell or mortgage the property itself, but he may encumber or dispose of his estate in it.

²⁵ The purchaser of his interest would take the same right to the use and occupancy of the premises which the life owner himself had, and be subject to the same restrictions in regard to injury and *waste*. ²⁶ The owner of the life estate must pay all ordinary taxes, and a just proportion of such necessary expenditures as are for the permanent benefit of the property, as insurance premiums.

6. Estate in Reversion. ²⁷ Where the owner of an estate in fee simple disposes of a life interest in it, he parts with only a portion of his estate. He still has remaining an interest in the property, and after the expiration of the life estate the premises will return, or *revert* to him, or to those who succeed to his interest; and therefore his remaining interest is known as an *estate in reversion*. ²⁸ This may be transferred in the same manner as the entire estate. ²⁹ In the

last illustration B has an estate for life, while A retains an estate in reversion, which he may transfer by deed or will, and whoever holds it will take the property in fee simple upon the termination of the life estate. It is to be noticed that these estates may be reunited at any time by act of the parties. A may convey to B, or B to A, or A and B together to a third party, in any of which cases the grantee would have full ownership of the property.

7. Dower. ³⁰The owner of real property being a married man, cannot convey it and give a perfect title unless his wife joins in the conveyance. This is because a wife has a right of dower in all the real property owned by her husband. This gives her no present right to the property in any way. ³¹The husband may sell it and the grantee take possession notwithstanding any objection the wife can make. Her right of dower is therefore said to be *inchoate*, that is, incomplete. ³²But if she survive her husband, the moment he dies, her right of dower is complete and she may claim the actual possession of her part of the property or receive the income thereof. ³³And this claim usually extends not only to all the real estate of which the husband dies the owner, but also of all he may have sold at any time during the existence of the marriage relation between them, in the conveyance of which she did not *bar her dower*, ³⁴by uniting in the deed or executing a separate relinquishment. In a few states the widow is only entitled to dower in the land which her husband owned at the time of his death, and hence it is not necessary for her to join in the husband's conveyance of real property. In some States, a married woman holding real estate in her own right may convey the same absolutely without the knowledge or consent of her husband.

³⁵In most states the widow's right of dower consists of the use, during her life, of a certain part of her husband's real property. This is usually one-third, but in some states a half or other fraction. ³⁶In such cases it furnishes an illustration of an estate for life. In a few states the statutes give to the widow for her dower, not a life estate, but the fee simple of her portion of the property. ³⁷In case of a refusal of the heirs to *set apart* the widow's interest, she may compel such division by an action for the admeasurement of dower.

³⁸Under the common law the husband had a somewhat similar right in the real property owned by his deceased wife, in case a living child had been born to them. This right was known as an *estate by the curtesy*. It is yet recognized by the laws of many of the states in that form, while it has been modified or abolished in others.

8. Other Estates. ³⁹Property is sometimes given to one person for the benefit of another. It then constitutes a *trust estate* in the person to whom it is thus given, who is called a *trustee*, and who must care for and manage the property, or pay to or use the proceeds for the benefit of such other person, who is sometimes called the *beneficiary*. There are statutes in most States prohibiting the creation of trust estates for more than a specified time.

⁴⁰Estates are distinguished also with regard to the number of owners. An estate in *severally* is one that is owned by one person. ⁴¹Those most frequently met

with which are held by several owners, are estates *in joint tenancy*, and estates *in common*. The distinction between these has been already explained (p. 142, sec. 4). The former is not favored by the law and will not be presumed. ⁴²In several States, there are statutes providing that unless it be explicitly provided in the conveyance that the parties shall take as joint tenants, any two or more owners of real property shall hold it as tenants in common. ⁴³Any one of several persons thus owning property may, in case a division cannot be agreed upon, bring an action for partition, and have his interest secured to him in severalty.

9. Highways. ⁴⁴The owner of farm lands almost universally owns to the middle of all public highways bounding his property. ⁴⁵The public has a right to use all his property within the limits of the roadway for the purposes of travel, and the owner may not in any way interfere with the exercise of such right. ⁴⁶He may, however, cut and remove the grass growing along the highway upon his land, or use it in any other way which does not abridge the rights of the public; and if the highways should be abandoned, he may resume full control of his property.

10. Streams. ⁴⁷A person is entitled to make reasonable use of a stream of water flowing through his land, but the exception already noted that an owner cannot use his own property in such a manner as to injure others or their property applies with great force to running water. The owner may make all ordinary use of it. ⁴⁸He may even change the course of the stream upon his own land, but it must be returned to its usual channel when it enters the property of the adjoining owner. ⁴⁹And he must not contaminate the water or throw into it any waste material, as saw dust, from a mill, to be carried beyond his premises and deposited to the detriment of other owners. ⁵⁰If land be bounded by navigable waters, the owner's title usually extends to high water mark. ⁵¹But if his boundary be a stream not navigable, the line between his own property and that of adjoining owners is the middle of the stream.

11. Easements. ⁵²It often happens that the owner of real property possesses certain privileges in neighboring lands, that is, rights which he may exercise over the property of others. These privileges are known as *easements*, and are appurtenances of the real property belonging to such owner, and pass with it to his grantee. ⁵³The right of way which one man has over his neighbor's land to enable him to reach a highway, or some other part of his own premises, or to procure water from a spring, or even to cut and carry away wood, is each an easement. ⁵⁴In cities where land is very valuable, adjoining owners often unite in erecting a wall on their dividing line, one half of it being on the property of each. This is called a *party-wall*, and supports the buildings on both sides of it. ⁵⁵Each owns his own half and has an easement in the other half, that is, a right to have it remain as a support to his building.

⁵⁶Easements are created by special grant, or are acquired by long usage, that is, by an exercise of the privileges for twenty years or more. ⁵⁷They continue until they are actually surrendered, or are lost by nonuser, which amounts to a surrender.

LESSON REVIEW.

1. How has real property been defined? 2. From that definition, what does the term include? 3. Illustrate the strictness of this rule. 4. May the parties vary this by agreement? 5. What are appurtenances? 6. In whom was the original title to real property in England supposed to have been? 7. What was the nature of the grants by which it was given to his subjects? 8. How was it allotted by them? 9. What was the interest of a vassal called, and to what system did it give a name? 10. What word in use at the present time was derived from *feud*? 11. What is meant by a *fee simple*? 12. How is this principle of original ownership applied in this country? 13. What is the right of *eminent domain*? 14. What is an *estate*? 15. What are some of the rights of the owner of an estate in fee simple? 16. What exception is there to his rights to use his property as he chooses? 17. What becomes of his property in case of his death without having disposed of it? 18. What becomes of it in case he has no heirs? 19. Has the owner in fee simple a right to create other estates in his property? 20. Illustrate what is meant by a life estate. 21. How may the owner of a life estate use the property? 22. How is he restricted in its use? 23. Who may restrain him from committing waste? 24. May the life owner sell or encumber his interest? 25. What would the purchaser of his interest take? 26. What payments must the life owner make? 27. What is an estate in reversion? 28. How may this be transferred? 29. Give an illustration. 30. May a married man convey his property alone and give a perfect title? Why not? 31. Why is the wife's dower interest called *inchoate*? 32. When does her right of dower become complete, and to what does it entitle her? 33. To what does this claim of dower usually extend? 34. How does the wife bar her dower? 35. In what does the widow's dower right usually consist? 36. What may her estate be said to be in such cases? 37. What may the widow do in case the heirs refuse to set apart her dower? 38. What is an *estate by the curtesy*? 39. What is a *trust estate*, and what are the parties called? 40. How is an estate designated which is owned by one person? 41. Name two estates in which there are two or more owners. 42. Which one of these is most favored in the law, and what provisions have been made regarding it by the statutes of some States? 43. How may such an owner secure his interest in severalty? 44. How far does the title of the owner of farm lands include adjoining highways? 45. What right has the public in such highways? 46. What use may the owner make of his land in the highway? 47. What use may a person make of a stream flowing through his land? 48. To what extent may he change its course? 49. In what way may he not use it? 50. What is the ordinary rule of ownership along navigable waters? 51. Where is the line when property is bounded by a stream not navigable? 52. What are *easements*? 53. Give illustrations. 54. What is a *party-wall*? 55. What rights have the adjoining owners in it? 56. How are easements created? 57. How long do they continue?

LESSON LVII.

REAL ESTATE CONVEYANCES.

1. Definitions and Explanations. ¹ Real estate conveyances include all instruments by which the title to real property is transferred from one person to another. ² They must always be in writing, but this requirement is fulfilled where the instrument is printed, with the exception of the signature. ³ As a matter of fact, nearly all such conveyances are now made by filling in printed forms, and are therefore partly written and partly printed. ⁴ We shall consider only the following familiar forms of conveyances, viz :

- | | | |
|---------------|---|--|
| 1. Deeds. | { | 1. Warranty, full covenant.
2. Warranty.
3. Quit-claim.
4. With covenant against grantor. |
| 2. Mortgages. | | |

2. Deeds. ⁵ A deed is an executed contract. It does not promise to do something; it does it, that is, it conveys the property. The parties must be competent to contract. ⁶ The one who conveys the property is called the *grantor*, and the one to whom it is conveyed, the *grantee*. ⁷ Deeds are now much simpler documents than formerly, although in many States they retain at the present time considerable of the old phraseology. ⁸ In other States, short forms have been adopted and declared by statute sufficient to convey complete title. The forms here given are those in use in the State of New York, except the acknowledgment, and they would probably be sufficient in any State.

3. (1) Warranty Deed, Full Covenant. The following is a form of warranty deed called *full covenant* :

Form No. 32.

THIS INDENTURE, Made this tenth day of January, in the year of our Lord one thousand eight hundred and eighty-eight, between NATHAN B. HELM and MARILLA, his wife, both of Ithaca, Tompkins County, New York, of the first part, and J. BENSON BOSTWICK, of Geneva, Ontario County, New York, of the second part,

WITNESSETH, That the said party of the first part, in consideration of the sum of five thousand dollars (\$5,000) to them duly paid, have sold, and by these presents do grant and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land situate in the town of Lansing, Tompkins County, New York, being a part of lot number forty-nine (49) in said town, and bounded and described as follows, to wit: Beginning at the southeast corner of land owned by James Terry, and running thence north one hundred and twenty-six and one-half (126½) rods; thence east to the east line of said lot number forty-nine (49); thence

south to land owned by Edmund H. Smith; thence west to the northwest corner of land owned by said Smith; thence south to the center of the highway; and thence west to the place of beginning, containing one hundred and three acres of land, more or less, with the appurtenances, and all the estate, title and interest therein of the said party of the first part. † And the said NATHAN B. HELM does hereby covenant and agree to and with the said party of the second part, his heirs and assigns, *that at the time of the ensembling and delivery of these presents, he is the lawful owner and is well seized of the premises above conveyed, free and clear from all incumbrances,* that the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, he will forever warrant and defend against any person whomsoever lawfully claiming the same or any part thereof.†

IN WITNESS WHEREOF, The parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in presence of

NATHAN B. HELM. [SEAL.]

MARILLA HELM. [SEAL.]

STATE OF NEW YORK, }
County of Tompkins, } ss:

On this tenth day of January, in the year one thousand eight hundred and eighty-eight, before me, the subscriber, personally appeared NATHAN B. HELM and MARILLA HELM, his wife, to me known to be the same persons described in and who executed the within instrument, and severally acknowledged that they executed the same; and the said MARILLA HELM on a private examination by me, apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.

WM. H. FITCH,

Notary Public.

4. *The Distinctive Feature of the foregoing deed is that part of it included between the asterisks, and which gives it the name of *full covenant*.¹⁰ These covenants are not essential to the validity of the conveyance, but being included in it they become very important. ¹¹The covenant that "he is the lawful owner and well seized of the premises" means that the grantor has a good title and the very estate he professes to convey. It is known as the *covenant of seizin*, and if he has not such title, the covenant is broken the moment the deed is delivered, and the grantee has an immediate right of action against him for damages. The same is true of the other covenant *against incumbrances*. ¹²An unpaid tax, a private right of way, or an undischarged mortgage, would constitute a breach of it and make the grantor liable.

5. (2) Warranty Deed. ¹³Leave out of the last form that part included between the asterisks, that is, the covenants of seizin and against incumbrances, and there remains the ordinary warranty deed. ¹⁴Unlike the covenants considered in the last section, this covenant of warranty is only broken by an actual *eviction* of the grantee, that is, by his being removed from the premises and the possession taken from him by process of law. Until then, he has no right of action against the grantor.

¹⁵If, from the foregoing form, there be excluded all that part between the daggers, it would still be a deed and would convey the title to the premises, but containing no covenants or warranty, the grantee would have no right of action for the recovery of damages from the grantor, in case the title should prove defective.

6. Quit-Claim Deed. The following is the ordinary form of quit-claim deed :

Form No. 33.

THIS INDENTURE, Made this seventeenth day of January, in the year of our Lord one thousand eight hundred and eighty-eight, between CHARLES H. WILTSIE (unmarried), of the city of Buffalo, County of Erie and State of New York, of the first part, and ASHLEY J. WILLIAMS, of the same place, of the second part,

WITNESSETH, That the said party of the first part, in consideration of the sum of eight hundred dollars (\$800), to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has *bargained, sold, remised and quit-claimed, and by these presents does bargain, sell, remise and quit-claim *unto the said party of the second part and to his heirs and assigns forever, all that tract or parcel of land situate in the City of Rochester, County of Monroe and State of New York, and more particularly distinguished as lot number twenty (20), as laid down on a map of Snyder & Stone's subdivision of a part of the Strong Tract on file in Monroe County Clerk's office in liber 5 of maps at page 83. Said lot number twenty (20) is situate on the east side of Kenmore street, and is thirty-three (33) feet in width, front and rear, and one hundred and fifty-nine (159) feet deep. Together with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises to the said party of the second part, his heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, The party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered in presence of

CHARLES H. WILTSIE. [SEAL.]

GEORGE F. SLOCUM.

[Acknowledgment the same as in Form No. 35, with proper change of names and dates.]

7. ¹⁶This Deed is Distinguished from the full covenant deed by having no covenants, and by containing different words of transfer. These are, in the quit-claim deed, the words included between the asterisks, and a reference to the corresponding words in the form of full covenant deed will give the distinction. ¹⁷The quit-claim deed conveys the grantor's title, if he have any, but it does not even amount to a representation that he has such title. ¹⁸It is the form of deed used by heirs or other tenants in common who divide their real property, and as it is said, "quit-claim to each other." ¹⁹That is, if A, B and C own property which they wish to divide, A and B quit-claim to C the portion set apart to him, describing it in the deed ; A and C in like manner quit-claim to B, and B and C to A.

This form of deed is also used where the grantor is in doubt as to the validity of his title, but whatever it may be, wishes to convey it. ²⁰It is also used generally in the relinquishment of apparent interests in land, in the surrender of easements, and in general where the grantor has no actual interest in making the conveyance, but does it for the benefit of the grantee to enable him to perfect or transfer his title.

8. Covenant against Grantor. ²¹It often happens that, although the grantor will not give a full covenant or warranty deed, yet he is perfectly willing

to covenant that he has not himself done or permitted anything to be done injuriously affecting the title, and in that case, if the grantee desires it, there is inserted into the deed what is known as the *covenant against grantor*, which is as follows :

Form No. 34.

And the said [*grantor's name*], for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that he has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by any means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may, be, impeached, charged or encumbered in any manner or way whatever.

²² This covenant, when used in a quit-claim deed, is inserted just before the last clause beginning "In witness whereof." ²³ It may also be used in the deed described in the last of section five preceding. It would then take the place of all the covenants included between the daggers in form No. 33, which would otherwise remain the same.

9. Execution. ²⁴ A deed is always executed under seal—it is a specialty (p. 14, sec. 4)—and the consideration need not, therefore, be stated, though it should in fact be always expressed. The names of both parties should be given in full and their respective places of residence stated. ²⁵ A deed is usually signed only by the grantor or grantors. But by accepting it the grantee becomes a party to it, and is bound by its provisions, as for example, a provision that he shall assume and pay a mortgage covering the premises. The grantor need not, however, sign the deed personally. ²⁶ He may do it by attorney, that is he may appoint some person by power of attorney who may sign the deed for him (p. 124, f. 17).

Acknowledgment. ²⁷ A deed is binding upon the person who signs it without an acknowledgment, but it cannot be recorded (p. 254, sec. 10) unless it has been properly acknowledged, except that in some states the affidavit of a subscribing witness to the genuineness of the grantor's signature will take the place of an acknowledgment. ²⁸ This acknowledgment is taken by some officer who has the proper authority as a Justice of the Peace or Notary Public. ²⁹ In some states when a husband and wife execute a deed, the law requires that the officer shall take the acknowledgment of the wife separate and apart from her husband. This is not now necessary in New York, but the clause is inserted in the acknowledgment to adapt it to use in other states where that requirement yet exists. ³⁰ The instrument may be acknowledged on the day of the date or at any time thereafter.

10. Delivery. ³¹ But the deed may be properly drawn and executed, and yet it has no force whatever. One thing is wanting to make it effective. This is *delivery*, and by it is meant the actual handing over of the deed to the grantee or some other person whom he has authorized to accept it. ³² The deed may be delivered immediately after its execution, or it may be held for months or years, but the moment the delivery is made the transfer is completed. ³³ A deed is

sometimes delivered conditionally to a third party, who is to hold it until the happening of some event, when he is to hand it over to the grantee. In that case it is said to be delivered *in escrow*.

11. (2) Mortgages. ³⁴A mortgage is the grant or conveyance of an estate or property to a creditor for the security of a debt, upon payment of which it is to become void. It is in effect a pledge of the property for the payment of the debt, and it is called a mortgage, whether the property pledged be personal or real. ³⁵The person who gives the mortgage—the debtor—is called the *mortgagor*, and the one to whom it is given—the creditor—is known as the *mortgagee*.

³⁶A mortgage of real estate is substantially the same in form as a deed, with the addition of a statement of the amount secured, and the time and manner of its payment; also, an authority to sell in case of default in such payment; and a clause making the instrument void in case payment shall be made as specified.

³⁷This last is called the *defeasance* clause. The following is an ordinary form of real estate mortgage and is supposed to be executed by the grantee to the grantor in form No. 32, to secure the payment of a part of the purchase price of the premises. The mortgagor's wife need not join in a purchase money mortgage but must in all others the same as in a deed and for the same reason.

Form No. 35.

THIS INDENTURE, made this tenth day of January, in the year of our Lord one thousand eight hundred and eighty-eight, between J. Benson Bostwick, of Geneva, Ontario County, New York, of the first part, and Nathan B. Helm, of Ithaca, Tompkins County, New York, of the second part, WITNESSETH, that the said party of the first part, in consideration of the sum of three thousand dollars, being a part of the purchase price of the premises hereinafter described, has sold, and by these presents does grant and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land situate in the Town of Lansing, Tompkins County, New York, being a part of lot number forty-nine (49) in said town, and bounded and described as follows, to-wit: Beginning at the Southeast corner of land owned by James Terry, and running thence North one hundred and twenty-six and one-half rods (126½); thence East to the East line of said lot number forty-nine (49); thence South to land owned by Edmund H. Smith; thence West to the Northwest corner of land owned by said Smith; thence South to the center of the highway; and thence West to the place of beginning, containing one hundred and three acres of land, more or less.

THIS GRANT is intended as a security for the payment of the sum of three thousand dollars, to be paid in three equal annual payments of one thousand dollars each, with annual interest at the rate of five per cent. on all sums at any time remaining unpaid, according to the conditions of a BOND this day executed and delivered by the said J. Benson Bostwick to the said party of the second part. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, [*in case clauses in Sec. 12 are used add*] or of the taxes, assessments or insurance hereinafter mentioned], it shall be lawful for the party of the second part, his executors, administrators, or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all moneys arising from such sale, to retain the amount then due for principal, interest, [*taxes, assessments or insurance*], together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand to the said J. Benson Bostwick, his heirs and assigns.

* * * * *

And this conveyance shall be void if full payment of the aforesaid moneys, both principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as hereinbefore specified and provided.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal the day and year first above written.

J. BENSON BOSTWICK. [SEAL,]

STATE OF NEW YORK, }
ONTARIO COUNTY, } ss.

On this tenth day of January, in the year one thousand eight hundred and eighty eight, before me, the subscriber, personally appeared J. Benson Bostwick, to me known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

WM. H. FITCH,
Notary Public.

12. Additional Clauses. ³⁸ There are three other clauses, one or more of which are now very frequently included in a mortgage of real estate, by way of additional security to the mortgagee. They are inserted immediately before the defeasance clause, and in place of the asterisks in the last form.

Form No. 30.

(1.) AND IT IS HEREBY EXPRESSLY AGREED, that in case any installment of principal, or any part thereof, or any interest moneys, or any part thereof, hereby secured to be paid, or any money paid for taxes, assessments, or insurance, as herein specified, shall remain due and unpaid by said party of the first part, his heirs, grantees or assigns, for the space of *sixty days* after the same shall by the terms hereof, become due and payable, that then and in that case, the whole principal sum hereby secured to be paid, together with all arrearage of interest thereon, shall, at the option of said party of the second part, his executors, administrators or assigns, become due and payable forthwith, anything herein contained to the contrary notwithstanding.

(2.) AND IT IS ALSO AGREED by and between the parties to these presents, that the said party of the first part, his heirs, grantees or assigns, shall and will keep the buildings erected and to be erected upon the lands above conveyed insured in some solvent incorporated Fire Insurance Company, against *Loss or Damage by Fire*, in an amount not less than *three thousand dollars*, the insurers to be chosen or approved by the party of the second part, his heirs, executors, administrators or assigns, and assign the policy and certificate thereof to the said party of the second part, his heirs, executors, administrators or assigns. And in default thereof it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and forthwith be due and payable without demand, with interest from the time of such payment, and shall be collectible in the same manner, and upon the same conditions as the interest hereinbefore mentioned.

(3.) AND IT IS HEREBY EXPRESSLY AGREED, by and between the parties to these presents, that the said party of the first part, his heirs or assigns, will pay and discharge all taxes and assessments that now are or shall hereafter be levied or assessed upon the said above described premises or any part thereof, when the same become due and payable, and in default thereof, for *sixty days* after the same shall be so levied or assessed, and become payable, the said party of the second part, his heirs, executors, administrators or assigns, may pay such taxes and assessments, and expenses of the same, and the amount so paid, and the interest thereon, from the time of such payment, shall forthwith be due and payable without demand from the said party of the first part, his heirs or assigns, to the said second party hereto, his heirs, represen-

tatives or assigns, by virtue hereof, and the same shall be deemed a part of the principal sum and secured by these presents, and shall be collectible in the same manner and on the same conditions as the interest on the principal sum hereinbefore specified.

13. Explanation of Clauses. "The first of these clauses is known as the *interest clause*. "Its effect is that in case the mortgagor does not make every payment within a certain specified time, which the parties may agree upon—usually sixty days—then the entire amount of the debt shall become at once due, and the mortgagee may enforce payment thereof. "With this clause inserted in form No. 35, if Bostwick should not pay his interest or the first payment of one thousand dollars on or before March 9th, 1889, then the whole sum of three thousand dollars would be due at once.

"The second is known as the *insurance clause*. "It is usually made to cover the amount of the mortgage if the value of the buildings equals or exceeds that sum. "This is used more particularly in cities where the value of the real property is likely to be largely represented by the buildings.

"The third is called the *tax and assessment clause*. This makes all unpaid taxes and assessments a part of the sum secured and collectible like the interest. "The effect of this is to make the whole amount of the mortgage due provided the mortgagor should fail to repay to the mortgagee the amount of any tax paid by him within the specified number of days after such payment by the mortgagee.

LESSON REVIEW.

1. What are real estate conveyances?
2. To what extent must they be in writing?
3. How are they usually made?
4. What forms of conveyances are here considered?
5. What kind of a contract is a deed?
6. What are the parties called?
7. What change has taken place in the form of deeds?
8. How has the form of deeds been regulated by statute?
9. What is the distinctive feature of the deed given in the text?
10. Are the covenants necessary to the validity of the conveyance?
11. What is the *covenant of seizin*, and what is its effect in a deed?
12. What will constitute a breach of the covenant against incumbrances?
13. How may the last form be transformed into a simple warranty deed?
14. When is the covenant of warranty broken?
15. What else may be omitted from the full covenant form and still leave a valid deed?
16. How is the quit-claim deed distinguished from the full covenant deed?
17. What is the effect of a quit-claim deed?
18. By whom is it ordinarily used?
19. Give an illustration.
20. By what persons is it in general used?
21. What is the purpose of the *covenant against grantor*?
22. At what point in a quit-claim deed is this covenant usually inserted?
23. May it be used in any other form of deed?
24. How is a deed always executed, and what does it therefore become?
25. By whom is a deed signed?
26. May another person sign it for him? How must he be authorized to sign the grantor's name?
27. Is a deed binding without an acknowledgment? And why should it be acknowledged?
28. By whom is an acknowledgment taken?

29. What is necessary in some states in taking the acknowledgment of husband and wife? 30. When may the instrument be acknowledged? 31. What further is necessary to render a deed effective? 32. When may a deed be delivered? 33. When is a deed delivered *in escrow*? 34. What is a mortgage? 35. What are the parties called? 36. What substantially is the form of a mortgage, and how does it differ from a deed? 37. What is the *defeasance clause*? 38. How many other distinct clauses are frequently inserted in a mortgage, and in what part of the instrument do they appear? 39. What is the first called? 40. What is its effect? 41. Illustrate this by application to the mortgage in the text. 42. What is the second clause? 43. For what amount is it usually made? 44. Where is it most used? 45. What is the third clause? 46. What is its effect?

LESSON LVIII.

1. The Debt. ¹It follows from the definition that a mortgage is given as collateral security and usually for a debt, though it may be given to secure the performance of some act, or for some other purpose. ²When it is used in the ordinary way the debt which it secures is usually represented by a bond, or one or more promissory notes, according to the custom of the state in which the property is located. ³If notes are used they are made in the usual form. ⁴In case the *interest, insurance, tax and assessment clauses* are embodied in the mortgage, they should also appear in the bond. The following, after inserting these clauses, is the form of bond to which the foregoing mortgage (p. 248, f. 35) would be collateral.

Form No. 37.

KNOW ALL MEN BY THESE PRESENTS, that I, J. BENSON BOSTWICK, of Geneva, Ontario County, New York, am held and firmly bound unto NATHAN B. HELM, of Ithaca, Tompkins County, New York, in the sum of six thousand dollars (\$6,000), to be paid to the said NATHAN B. HELM, or to his certain attorney, executors, administrators or assigns. For which payment, well and truly to be made I bind myself and my heirs, executors or administrators, jointly and severally, firmly by these presents.

Scaled this tenth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

The condition of this obligation is such, that if the above bounden, J. BENSON BOSTWICK, his heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above named NATHAN B. HELM, or to his certain attorney, executors, administrators or assigns, the sum of three thousand dollars (\$3,000), in three equal annual payments, with annual interest on all sums at any time remaining unpaid, without fraud or delay, then the preceding obligation to be void; otherwise to remain in full force and virtue,

J. BENSON BOSTWICK [SEAL.]

[Acknowledgment the same as in Form No. 35.]

⁹ If a real debt existed, as stated in the mortgage, a bond or note would not be necessary to enable the mortgagee to realize the amount of his claim if the premises were worth enough to satisfy it. ⁹ But his rights stop there, while if he has a bond or note he has a personal claim against the mortgagor and may sue him for any balance left due after the sale of the premises, and the appropriation of the proceeds to the payment of his debt.

2. Sale of Mortgaged Premises. ⁷ The giving of a mortgage does not prevent the mortgagor from selling his premises. He still has an interest called an *equity of redemption* which he may sell. ⁸ He conveys the property subject to the mortgage, and this should be made to appear in the deed by inserting these or similar words, to wit: "This conveyance is made subject to a certain mortgage made by," etc. (*describing it*). ⁹ Under such conveyance the grantee must pay the mortgage debt and interest if he wishes to save his property, but he incurs no liability otherwise if he chooses to let the property be sold under the mortgage. ¹⁰ Very frequently it is agreed that the grantee shall assume the payment of the mortgage. This is effected by adding to the clause above given after the description of the mortgage, these or similar words: "which said mortgage the party of the second part hereby assumes and agrees to pay as a part of the purchase price of said premises." ¹¹ Accepting a deed containing this clause binds the grantee to make such payment, and should he fail to do so and permit the property to be sold for less than the amount of the mortgage debt, he would be liable to the grantor for damages.

3. Assignment of Mortgage. But the mortgagee who has loaned money may wish to make other use of it. ¹² In that case he may sell the mortgage, and assign it to the purchaser, who thereupon has all the rights under it which the mortgagee possessed. ¹³ The purchaser is then known as the *assignee*. The following is a proper form of assignment for the mortgage given in form No. 35.

Form No. 38.

THIS INSTRUMENT, made this 24th day of January, 1888, between NATHAN B. HELM, of Ithaca, Tompkins County, New York, of the first part, and JOHN CUNNINGHAM, of Dryden, Tompkins County, New York, of the second part,

WITNESSETH, that the party of the first part, for a good and valuable consideration to him in hand paid by the said party of the second part, has sold, assigned, transferred and conveyed, and does hereby sell, assign, transfer and convey, to the party of the second part, a certain mortgage, bearing date the tenth day of January, 1888, made by J. BENSON BOSTWICK to NATHAN B. HELM, to secure the payment of the sum of three thousand dollars and interest thereon from the date thereof, recorded in the clerk's office of Tompkins County, in liber 10 of mortgages, at page 251, on the 12th day of January, 1888, at 3 o'clock, P. M., together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon. And the party of the first part hereby covenants that there is to become due on said bond and mortgage, the sum of three thousand dollars, with interest.

IN WITNESS WHEREOF, the party of the first part has hereunto set his hand and seal the day and year first above written.

NATHAN B. HELM [SEAL.]

[Acknowledgment the same as in form No. 35, with proper change of names and date.]

4. Discharge. ¹⁴ When a mortgage has been paid it should be discharged of record (p. 254 sec. 10). ¹⁵ The discharge must be executed by the mortgagee if he holds the mortgage at that time, but if not then by the assignee, provided he records his assignment. ¹⁶ Sometimes when the assignment has not been recorded, a discharge is procured from the mortgagee to save the expense of recording the assignment or to avoid making public the fact that the mortgage had ever been assigned. ¹⁷ It is not the duty of the holder of a mortgage to prepare a discharge when the mortgage is paid, because he has no interest in having it discharged. He is bound, however, to execute the discharge upon request, when it is tendered to him ready for his signature and acknowledgment. The following is a proper form for a discharge by the assignee of the foregoing mortgage:

Form No. 39.

I, John Cunningham, of Dryden, Tompkins County, New York, assignee of the mortgage hereinafter described, do hereby certify, that a certain indenture of mortgage, bearing date the tenth day of January, in the year of our Lord one thousand eight hundred and eighty-eight made and executed by J. Benson Bostwick, to Nathan B. Helm, and thereafter and on or about the 24th day of January, 1888, by an instrument in writing, duly assigned to me, and recorded in the office of the clerk of the county of Tompkins, in Liber 10 of Mortgages, at page 251, on the 26th day of January, 1888, at 3 o'clock, p. m., is redeemed, paid off, satisfied and discharged. Dated the 1st day of May, 1888.

JOHN CUNNINGHAM. [L. s.]

STATE OF NEW YORK, }
COUNTY OF TOMPKINS, } ss.

On this first day of May, in the year one thousand eight hundred and eighty-eight, before me, the subscriber, personally appeared John Cunningham, to me personally known to be the same person described in, and who executed the within instrument, and he acknowledged that he executed the same.

NELSON STEVENS,
Justice of the Peace.

5. Foreclosure. ¹⁸ In case the mortgagor fails to pay the mortgage debt when due, the mortgagee or assignee may foreclose the mortgage. ¹⁹ The manner of doing this depends upon the laws of the State in which the mortgaged property is situated. ²⁰ Ordinarily it may be foreclosed by an action brought in some court of the State, by which a sale of the property is decreed. This is the method most generally adopted, and is considered the preferable one by the larger number of attorneys. The legislatures of many States have enacted laws providing for the foreclosure of mortgages by publication. ²¹ This is called *statute foreclosure*, and requires the publication in a newspaper for a specified length of time, of a notice stating, among other things, the amount due and the time and place of sale. The result is, however, in either case, that the premises are sold and the proceeds applied to the payment of the mortgaged debt. If any balance remain it is paid to the mortgagor or his grantee having title to the premises.

6. Deed of Trust. ²² In some of the States what is known as a *deed of trust* is used instead of a mortgage. ²³ It is an absolute conveyance of the premises in trust for the benefit of the creditor, to some third party called a *trustee*. In case of the debtor's default in payment the trustee is authorized to sell the

property according to law, and satisfy the creditor's claim out of the proceeds of such sale. It is in effect a mortgage. ²⁴ It is not, however, assigned in the same manner. It is usually collateral to a promissory note, which is transferred by indorsement and carries with it all rights of security under the deed of trust.

7. Land Contract. ²⁵ Real property is often sold under a *land contract*, which must always be in writing, (p. 34, sec. 3). ²⁶ This method is adopted when the purchaser can only make a small payment at the time, when the owner requires time to perfect his title, or when there is some other reason for delay in delivering the deed. ²⁷ The contract is therefore an agreement upon sufficient consideration, on the part of the owner, to sell or on the part of the purchaser to buy the particular premises, which are to be conveyed at some specified future date, or when the purchase price or some particular part of it shall have been paid. In the last case it also contains an agreement on the part of the purchaser to execute and deliver to the seller at the time of completing the conveyance, a bond and mortgage, or a note and mortgage to secure the payment of the balance of such purchase price. Form No. 64 is an example of the usual land contract.

8. Execution. ²⁸ What has been said (p. 247, sec. 9) in regard to the execution and delivery of deeds applies substantially to mortgages, deeds of trust, and in fact to assignments and discharges of mortgage.

9. Subsequent Mortgage. ²⁹ The fact that premises have been mortgaged does not prevent mortgaging them repeatedly thereafter, but the right of subsequent mortgagees are inferior to those of the first. ³⁰ The holder of any mortgage may foreclose it, but he cannot affect the rights of prior mortgagees, though he does thus destroy or cut off the claim and lien of all subsequent mortgagees. ³¹ Hence the owner of a subsequent mortgage must purchase the premises when sold under a prior mortgage to protect himself. ³² Mortgages take precedence of each other therefore in the order of their priority in execution, delivery and record. ³³ But taxes are first liens without reference to the date when they became due, and take precedence of all other encumbrances.

10. Recording. ³⁴ After a deed, mortgage, or trust deed has been executed and delivered, the person receiving it ought always to have it recorded or registered immediately ; and the same is true in regard to assignments and discharges of mortgage. In every organized county there is provided at the county seat an office or building in which public records are preserved. ³⁵ This is in charge of an officer whose duty it is to receive and record in books furnished for that purpose, all conveyances of real property situated within the county, and instruments affecting the title thereof. ³⁶ Recording a deed or other instrument consists in writing it out in full in the record books. ³⁷ The originals are returned to the owners when called for, but they are only valuable thereafter for convenience of reference. ³⁸ In some States all such instruments are recorded in the office of the county clerk, or of the *Register of Deeds* of the county in which the property is located. The law prescribes the fees for registry. ³⁹ An instrument is considered in law as registered or recorded when it is handed to the recording

officer for that purpose. ⁴⁰ The exact time even to the minute of its receipt is therefore always entered upon the instrument by such officer, and that entry determines the date of record.

11. Requisites for Recording. ⁴¹ In order to entitle any one of the foregoing instruments to be recorded it must usually be acknowledged (p. 247, sec. 9). ⁴² As has been said, however, the laws of some States permit the recording of an instrument to which has been attached the proper affidavit of a subscribing witness. The following would be a proper form of affidavit in place of an acknowledgment in form No. 33.

Form No. 40.

STATE OF NEW YORK, }
COUNTY OF ERIE, } ss.

On this 18th day of January in the year 1888, before me, personally, came George F. Slocum, subscribing witness to the above instrument, with whom I am personally acquainted, who being by me duly sworn, said that he resided in the city of Buffalo, in said State; that he was acquainted with Charles H. Wiltse, and knew him to be the person described in, and who executed the said instrument; and that he saw him execute and deliver the same, and he acknowledged to him, the said George F. Slocum, that he executed and delivered the same, and that he, said George F. Slocum, thereupon subscribed his name as a witness thereto.

EARL B. PUTNAM,

Notary Public.

In case the instrument has been properly acknowledged, or the affidavit of the subscribing witness properly made in the county where the property is situate, it will be received and recorded upon presentation and payment of fees. ⁴³ In some states, however, where the acknowledgment, or the affidavit if that is permissible, is made or taken without the county, there must be first attached to the instrument the certificate of the County Clerk or other Clerk of the courts of the county where the instrument was executed, certifying under his hand and official seal to the authority and genuineness of the signature of the officer before whom such acknowledgment or affidavit was made or taken. This is always spoken of as a *Clerk's Certificate*. ⁴⁴ In other states, if the acknowledgment be taken by a Notary Public, who has attached his official seal, the instrument will be recorded no matter in what county or state it was executed. ⁴⁵ The laws of some states provide for the appointment of commissioners in other states authorized to take the acknowledgment of instruments to be used or recorded in the state making such appointment. ⁴⁶ An instrument thus acknowledged must have attached, before it can be recorded, a certificate of the Secretary of State of the appointing State, to the genuineness of the authority and the signature of such commissioner.

11. Effect of Recording. ⁴⁷ The validity of an instrument is not increased by record. ⁴⁸ A deed conveys the title just as well before as after registry. And as between the grantee and the grantor or his heirs, or third parties having knowledge of the conveyance, there is no necessity of recording the instrument, except to preserve the evidence of title in case of the loss or destruction of the deed. ⁴⁹ But as to third parties having no knowledge of the transfer, the record-

ing of the instrument is absolutely necessary in order to protect the grantee's title. "For example, suppose A sells and conveys his farm to B, who neglects to record his deed. Afterwards A sells the same property to C, who has knowledge of the transfer to B; but C cannot hold it, notwithstanding the fact that he may have paid A full value for the property. But on the other hand, if C had purchased the property, paying value for it, *without knowledge* of the former conveyance, he would hold the property as against B, and be protected in his possession and ownership. "The laws providing for the registering or recording of such instruments are known as *registry laws*, and are designed to give public notice of the condition of the titles to real property.

LESSON REVIEW.

1. What kind of security is a mortgage?
2. How is the debt usually represented?
3. If notes are used, what are their form?
4. When should the interest, insurance, tax and assessment clauses appear in the bond?
5. Must there be a bond or note accompanying the mortgage?
6. How does the absence of a bond or note affect the mortgagee's rights?
7. May mortgaged premises be sold?
8. How should they be conveyed?
9. What is the effect of such conveyance?
10. How is the transfer made where the grantee assumes the payment of the mortgage?
11. What is the effect of such conveyance?
12. How may the mortgagee realize on his mortgage before it becomes due?
13. What is the purchaser called?
14. What should be done when a mortgage has been paid?
15. By whom should the discharge be executed?
16. In what case may the mortgagee discharge the mortgage after he has sold it?
17. What is the holder of a mortgage bound to do in discharging it?
18. What may the mortgagee or assignee do in case the mortgagor fails to pay the mortgage when due?
19. Upon what does the manner of foreclosing the mortgage depend?
20. What is the usual method of foreclosure?
21. What is statute foreclosure, and what is the general plan?
22. What is a *deed of trust*?
23. What is its nature?
24. How is it transferred?
25. Under what other form of agreement is real estate sometimes sold?
26. When is this method adopted?
27. What is a *land contract*?
28. How, in general, are mortgages, deeds of trust, assignments and discharges of mortgage executed?
29. May there be more than one mortgage upon the same premises?
30. What effect does the foreclosure of one mortgage have upon the rights of the holders of other mortgages covering the same premises?
31. How must the owner of a subsequent mortgage protect his interest in case of foreclosure?
32. What determines the priority of the lien of mortgages?
33. Of what liens do taxes take precedence?
34. When ought a conveyance to be recorded?
35. Where and by whom are such instruments recorded?
36. How are instruments recorded?
37. What becomes of the originals?
38. What is a register of deeds?
39. When is an instrument considered in law as recorded?
40. How is this indicated?
41. What is the first requisite for recording?
42. What may take the place of an acknowledgment?
43. What else is required by the laws

of some States as an additional prerequisite to registry? 44. What is sufficient in some States to entitle a conveyance to be recorded without a clerk's certificate? 45. What provisions are made by the laws of some States for the appointment of commissioners to take acknowledgements, etc., in other States? 46. What certificate must be attached to acknowledgments so taken to entitle the instruments to be recorded? 47. Is an instrument valid without being recorded? 48. As between what parties does it have no effect? 49. As to what parties is it necessary? 50. Give an illustration? 51. What, then, is the purpose of the registry laws?

LESSON LIX.

LANDLORD AND TENANT.

1. Definitions and Explanations. The owner of real property may do what he pleases with it, and he may therefore let or rent it to some other person. ¹This he ordinarily does for a specified time, but it may be for an indefinite time. ²Such renting establishes the relation of *landlord and tenant*. ³The owner is then known as the *landlord* or *lessor*, and the person to whom he has let the premises as the *tenant* or *lessee*. The compensation agreed to be paid by the tenant to the landlord for the use of the premises is usually termed *the rent*; ⁴and the contract between the parties is called a *lease*.

2. Lease. ⁵Under the Statute of Frauds (p. 34, sec. 3), leases of land for more than one year are void unless made in writing. Leases for one year or less may be oral; ⁶and such a lease is valid, although the year is to commence at a future day, as where an agreement is made in February by which property is leased for a year from the first day of April following. ⁷In some states, however, the statute has been so changed that a lease need not be in writing unless it is for more than three years. ⁸Leases are usually executed under seal; and they are often acknowledged, which, although desirable, is not necessary unless they are to be recorded. ⁹The laws of some states provide that leases for more than a specified number of years must be recorded in order to fully protect the tenant's interests. ¹⁰The lease is ordinarily signed by both parties, and should always be executed in duplicate in order that each party may have one of them. ¹¹In some localities it is customary to have the lease left with some third person for the benefit of the parties to it.

The following is an ordinary form of lease:

Form No. 41.

A LEASE, made and executed between ROSWELL BEARDSLEY, of the city of Auburn, New York, of the first part, and LEWIS J. TOWNLEY, of the town of Venice, Cayuga County, New York, of the second part, the 4th day of February, in the year of our Lord one thousand eight hundred and eighty eight.

IN CONSIDERATION of the rents and covenants hereinafter expressed, the said party of the first part has demised and leased, and does hereby demise and lease to the said party of the second part the following premises, viz: his farm, consisting of one hundred and fifty acres of land, situate two miles east of Northville, in the town of Genoa, Cayuga County, N. Y., with the privileges and appurtenances, for and during the term of two years, from the first day of April, 1888, which term will end March 31st, 1890. And the said party of the second part covenants that he will pay to the party of the first part, for the use of said premises, the annual rent of five hundred dollars, to be paid in two equal payments of two hundred and fifty dollars each, on the first days of September and March. And provided said party of the

second part shall fail to pay said rent, or any part thereof, when it becomes due, it is agreed that said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.

The party of the first part agrees to pay all taxes to be assessed on said premises during said term.

The party of the second part covenants that at the expiration of said term he will surrender said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements excepted.

WITNESS the hands and seals of the said parties in duplicate, the day and year first above written.

In presence of

A. J. CONGER, Auburn, N. Y.

ROSWELL BEARDSLEY [SEAL.]

LEWIS J. TOWNLEY [SEAL.]

3. ¹² The Term, that is, the time for which the lease is given, is usually a matter of agreement between the parties, and may generally be as long or as short as they please. ¹³ There are, however, some exceptions to this as the result of statute restrictions, as in New York, where a lease of farm lands is not legal for more than twelve years. ¹⁴ When the term is not specified in the lease, the law will usually presume that it was a renting from year to year, and the landlord cannot remove the tenant until the expiration of a year. ¹⁵ And where a tenant has been in possession of premises under a lease for one or more years, and after its expiration continues in such possession the law will in like manner presume a tenancy from year to year.

4. ¹⁶ The Rent is usually specified in the lease, whether oral or written, as well as the time when it is to be paid. ¹⁷ Sometimes also the place where payment is to be made is stated, but if the lease be silent in regard to that, it will be payable upon the land.

¹⁸ Rent may be made payable at such times as the parties agree upon, but, except in case of farm lands, in by far the larger number of leases it is made payable monthly, and it is in such cases not due until the end of the month, unless there be a special provision making it payable in advance. ¹⁹ If a tenant be in possession of premises without any agreement as to the amount of rent to be paid, the law will give the landlord a reasonable compensation.

²⁰ Under the common law the rent must be paid by the tenant for the full term, even though the premises should meantime be entirely destroyed by fire. ²¹ This has, however, been regulated by statute in some states so that a tenant under such circumstances is relieved from the obligation to pay rent under his lease.

5. Lessor's Rights. ²² The landlord has a right to insist upon the performance of all of the conditions of the lease. He has no right to interfere with the proper use of the premises by the tenant, but he may prevent him from committing waste, that is, doing anything which will permanently injure the property.

²³ The law gives him the remedy by injunction (p. 42, sec. 5). ²⁴ If the rent is not paid or the tenant does not remove from the premises at the expiration of his term, he may, under the laws of most of the states, recover possession of the property by what is usually termed *summary proceedings*. They are so called because the tenant may be removed summarily by an order of a court or justice. Ordinarily a tenant may be thus removed within two or three days. ²⁵ Formerly

the landlord, in case of nonpayment of rent, could seize any personal property found on the premises to enforce the payment of rent. This was known as *distress for rent*, but it is not now generally allowed, the remedy of evicting the tenant by summary proceedings having taken the place of it.

²⁶ The landlord, having only parted with the right to possession, yet retains the title, and he may therefore mortgage the premises or sell them, but the grantee or mortgagee takes subject to the tenant's rights.

6. Lessee's Rights. ²⁷ The tenant has a right to the possession and enjoyment of the premises to such an extent that the landlord can no more enter upon the property without his permission than a stranger, unless the privilege be reserved in the lease. ²⁸ But if the landlord have not a good title to the premises, and the tenant should be *evicted*, that is, removed from them through due process of law by one having a better title than the landlord, he must abide the result and lose all rights under his lease. ²⁹ The landlord could give him no better claim to the property than he himself possessed. This is the case where a tenant rents property already covered by a mortgage. ³⁰ If the mortgagee forecloses his mortgage, the tenant may be removed, notwithstanding his lease has not expired. ³¹ But in all such cases the tenant is relieved from his agreement to pay rent to the landlord.

³² He has a right to use the property in a proper manner. ³³ If there be a wood-lot on a rented farm, the tenant will be entitled to procure therefrom necessary wood for fuel, but he cannot cut wood for sale, or to be used except on the premises. ³⁴ A tenant who holds for an uncertain time, as a tenant for life, is entitled to all the crops, called *emblements*, which are on the ground when his lease is terminated, because he could not tell when this might happen, and hence could not provide for it in advance. ³⁵ On the contrary, where his term is definite, the general rule is that he is not entitled to such emblements. ³⁶ For example, a tenant whose lease will expire in the spring, cannot usually hold the crop grown from winter wheat sown the preceding autumn, without a special agreement to that effect, though in some states he is entitled to a crop thus grown.

³⁷ The tenant may also sell his interest, sometimes called *lease-hold* interest, in the absence of any agreement to the contrary in his lease. ³⁸ He may do this by sub-letting, or he may assign his lease. ³⁹ By the first method he stands in the position of a landlord to the new tenant, who has no dealings with the owner, and in the second the new tenant takes the place of the former one and pays his rent to the landlord, ⁴⁰ but in neither case is the first tenant relieved from liability to his landlord. ⁴¹ It is quite customary to insert a clause in leases by which the tenant covenants "not to sub-let the premises or any part thereof, or assign" the lease without the consent of the landlord.

7. The Premises. ⁴² Unless there is a special agreement to that effect, the landlord is bound to make no repairs, no matter how uninhabitable the premises may become. If any repairs are needed the tenant must make them at his own expense, or do without them. ⁴³ When such repairs are necessary to put and keep the premises in as good condition as when rented, except for ordinary wear, then the tenant must make them. ⁴⁴ This requires him to replace broken glass,

keep up fences, and the like. But, unless he has covenanted in his lease to repair, he need not make good damages caused by fire or other inevitable accidents.

8. Fixtures. Very important questions frequently arise between landlord and tenant in regard to fixtures. ⁴⁵ In general whatever a person builds upon or into the property of another belongs to the latter, but this rule has been considerably modified in its application to landlords and tenants. ⁴⁶ A tenant may remove things that he has annexed to the land or buildings for the purpose of trade or manufacture, unless the same are built or fixed into the wall of a building so as to be essential to its support. ⁴⁷ A tenant who makes additions to the property or improvements upon it for his own better use of the same, may remove such additions or fixtures, provided such removal will not leave the premises in a worse condition than they were when he took possession. ⁴⁸ Such removal must be made before his term expires, or he will be held to have waived his right.

9. Recovering Possession. ⁴⁹ Under an ordinary lease like the one given in the text, when the term expires the landlord is entitled to possession, and the tenant must remove, and if he does not the landlord may remove him by summary proceedings. ⁵⁰ But when the term is indefinite, or where by agreement or presumption of law the letting is from year to year, the tenancy cannot be terminated by either party without giving to the other six months' notice, or such other notice as may be prescribed by the statutes of the particular State. ⁵¹ In the absence of statute provisions, it must be a six months' notice. ⁵² Where the renting is by the month it is usually necessary to give a month's notice, and similarly a week's notice in case the renting is by the week. ⁵³ The landlord cannot evict the tenant without giving such notice, and if the tenant leaves or sub-lets the premises without having given the necessary notice the landlord may still hold him for the payment of rent unless he accepts the surrender, or adopts the sub-tenant, by receiving rent from him. The following is a proper form of notice from landlord to tenant for the purpose of terminating a tenancy from year to year, or for an indefinite time. It may be readily varied to suit the case, where the renting is for a shorter period.

Form No. 42.

I hereby give you notice to quit and deliver up. on the first day of April next, the possession of the farm which you now hold of me as a tenant.

Dated Jan. 11, 1888.

JAMES M. ARNOLD,

To A. C. McLACHLAN,

Landlord.

Tenant.

The following would be a proper form of notice from the same tenant to his landlord :

Form No. 43.

I hereby give you notice, that I shall quit and deliver up on the first day of April next, the possession of the farm which I now hold of you as a tenant.

Dated Jan. 11, 1888.

A. C. McLACHLAN,

To JAMES M. ARNOLD,

Tenant.

Landlord.

LESSON REVIEW.

1. How does the owner of property usually rent the premises? 2. What relation does such renting establish? 3. What are the parties called? 4. What is the contract between them called? 5. Why must leases for more than one year be in writing? 6. May a verbal lease be made to commence at a future date? 7. Does the rule as to the length of time for which an oral lease is valid differ in different States? 8. How are leases usually executed? When must they be acknowledged? 9. Why must leases sometimes be recorded? 10. By whom is a lease signed? 11. What custom obtains in some places in regard to the custody of the lease? 12. What is meant by the *term* and how is it fixed? 13. Is there any limit to its length? 14. What is the presumption where no term is stated in the lease? 15. Under what other circumstances does the same presumption arise? 16. Is the rent usually specified in the lease? 17. Where will the rent be payable in case no place is specified in the lease? 18. When rent is payable monthly is it due at the beginning or end of the month? 19. What rent will the law give to the landlord when the amount is not specified in the lease? 20. Under the common law did the destruction of the buildings release the tenant from payment of rent? 21. How has this rule been modified? 22. State some of the landlord's rights. 23. How may he prevent the tenant from committing waste? 24. What are *summary proceedings*, and how are they used? 25. What was *distress for rent*? 26. May the landlord sell premises he has rented? Does this affect the tenant's interest? 27. How complete is the tenant's right of possession of the premises? 28. When may the tenant be evicted by a third party? 29. Why can the tenant not hold the premises against such third party under his lease? 30. Give an illustration. 31. Where a tenant is so evicted must he continue to pay rent? 32. How may the tenant use the premises? 33. Give an illustration. 34. What are *emblements*, and what tenants are entitled to them and why? 35. What tenants are not entitled to them? 36. Give an illustration? 37. When may the tenant sell his interest? 38. How may he do this? 39. What is the relationship established by both methods? 40. Does either method relieve him from liability to his landlord for the payment of rent? 41. What clause is often inserted to prevent such transfer to the tenant? 42. Is the landlord bound to make repairs? 43. What repairs must the tenant make? 44. Give an illustration. 45. What is the general rule in regard to fixtures? 46. What things annexed to the land for the purpose of trade or manufacture may the tenant remove? 47. What is the rule regarding the removal by a tenant of additions and improvements? 48. When must such removal be made? 49. In case the term is specified in the lease when is the landlord entitled to possession? 50. When is a notice necessary to terminate the tenancy? 51. In the absence of statute provisions what must be the length of such notice? 52. What notice is usually required where the renting is from week to week or month to month? 53. In what cases may the landlord hold the tenant for payment of rent where the tenant leaves or sub-lets the premises without notice?

BUSINESS FORMS.

Form 44.

PROMISSORY NOTE — NON-INTEREST BEARING.

\$100.

ST. PAUL, Minn., *Feb.* 1, 1888.

Sixty days after date, I promise to pay to the order of H. W. BANNING, one hundred dollars, at the Fourth Nat'l Bank, New York City, value received.

Due April 5, '88.

WILLIAM WINDOM.

REMARK.—A note may be made payable at any place agreed upon by the parties.

Form 45.

PROMISSORY NOTE — INTEREST BEARING.

\$500.

BOSTON, Mass., *Jan.* 6, 1888.

One year after date, I promise to pay to the order of EDWARD H. BROWN, five hundred dollars, value received, with interest.

Due Jan. 9, '89.

JOHN P. WINSLOW.

Form 46.

PROMISSORY NOTE — JOINT AND SEVERAL.

\$6,000.

COLUMBUS, Ohio, *Jan.* 21, 1888.

Forty-five days after date, we jointly and severally promise to pay to the order of J. B. FORAKER, six thousand dollars, value received, with use.

Due March 10, '88.

STANLEY MATHEWS.

HENRY C. PERKINS.

Form 47.

PROMISSORY NOTE — JOINT.

\$1,000.

ROCHESTER, N. Y., *Feb.* 15, 1888.

Ninety days after date, we promise to pay to the order of O. F. WILLIAMS, one thousand dollars, at Commercial Nat'l Bank, value received, with interest.

Due May 19, '88.

SILAS N. HADLEY.

WM. H. MCARTHUR.

JOHN V. NOBLE.

Form 48.

PROMISSORY NOTE — NOT NEGOTIABLE.

\$246.28.

AUSTIN, Texas, *Jan. 4, 1888.*

Six months after date, I promise to pay HOMER G. BARLOW, two hundred and forty-six $\frac{28}{100}$ dollars, value received, with use.

Due July 7, '88.

JOHN E. KING.

REMARK.—The insertion of the word *only* after the name of the payee renders a note non-negotiable.

Form 49.

PROMISSORY NOTE — DEMAND.

\$2,000.

CLINTON, N. Y., *March 1, 1888.*

On demand, I promise to pay to the order of WILLIAM S. HAM, two thousand dollars, value received, with interest.

L. M. SMITH.

REMARK.—Due upon presentation, without grace. If not presented before, it will outlaw in six years from its date.

Form 50.

JUDGMENT NOTE.

\$800.

BURLINGTON, Vt., *March 2, 1888.*

Thirty days after date, I promise to pay RICHARD W. BAILEY, or order, eight hundred dollars, with interest; and I do hereby confess judgment for the above sum, with interest and cost of suit, a release of all errors and waiver of all rights to inquisition and appeal, and to the benefit of all laws exempting real or personal property from levy and sale.

Due April 4, '88.

PETER J. CONLEY.

Form 51.

CHATTEL NOTE.

NEWARK, New Jersey, *Feb. 16, 1888.*

On or before July 1, 1888, for value received, I promise to pay WALTER L. JONES, three hundred dollars; to be paid said JONES at my warehouse by the delivery to him of wheat, corn and oats, at current prices, one hundred dollars worth of each of the kinds of grain mentioned.

Due July 1, '88.

JULIUS R. CHAMBERLAIN.

REMARK.—Chattel notes are not negotiable, and if not redeemed according to their conditions, they become money contracts after maturity

Form 52.

\$100.

ST. PAUL, Minn., Feb. 1, 1888.

Sixty days after date, I promise to pay to the order of H. W. BANNING, one hundred dollars, at Fourth National Bank, New York City, value received.

Due April 5, '88.

WILLIAM H. WINSLOW.

H. W. BANNING.

Pay to the order of F. R. HATCH.

P. H. SULLIVAN.

Pay to the order of HENRY H. COLLINS, without recourse to me.

F. R. HATCH.

Pay to T. H. LEE only.

HENRY H. COLLINS.

"For value received I hereby waive demand, protest and notice of demand, and notice of non-payment on within note.

Date (—.)

(Signed)

Blank endorsement.

Full endorsement by P. H. Sullivan, the holder.

Qualified endorsement.

Restricted endorsement.

REMARK.—Waiver of protest by the endorser or endorsers is required by banks in the event of a desire on the part of the maker or any endorser to avoid the expense or dishonor of a *protest*. In order to waive protest the endorser or endorsers subscribe to the above form written or stamped on the back of the note.

Form 53.

PROMISSORY NOTE—NEGOTIABLE WITHOUT ENDORSEMENT AND CONTAINING
"THE MARRIED WOMAN CLAUSE."

\$700.

ALBANY, New York, Jan. 2, 1888.

Ten days after date, we promise to pay EZRA P. COOKE, or bearer, seven hundred dollars, value received, with interest.

Due Jan. 15, '88.

CHAS. R. JACOBS.
SUSAN JACOBS.

REMARK.—It is necessary in some States where a married woman wishes to charge her separate property with the payment of any obligation, that she should *do so* distinctly in writing. The following or a similar form is sufficient, and is known as the *married woman clause*.

"For value received I, [name of woman] do hereby charge my separate estate with the payment of this note [or other security, naming it], as though I were unmarried."

If the woman was joint maker of a note as in the foregoing form this charge should be added to it above the signatures, but if she were to endorse or guarantee payment it should be in like manner made a part of the endorsement or guaranty and properly signed.

Form 54.

CHATTEL MORTGAGE.

TO ALL TO WHOM THESE PRESENTS SHALL COME: *Know Ye*, That I, JOHN McLACHLAN, of Lyons, County of Wayne, N. Y., am indebted unto GEORGE G. WANZER, of Palmyra, in the sum of three hundred and ten dollars and fifty cents, being for the rent of the farm now occupied by me, and seed wheat furnished to me by said WANZER.

Now for securing the payment of said debt, and the interest thereon from the date hereof, to the said GEORGE G. WANZER, I do hereby sell, transfer and assign to the said WANZER the property described in the following schedule, viz.:

One top buggy, one lumber wagon, and one yoke of red oxen:

Provided Always, and this mortgage is on the express condition, that if the said JOHN McLACHLAN shall pay to the said GEORGE G. WANZER, his assigns or representatives, the sum of three hundred and ten dollars and fifty cents, with interest thereon, six months from date, which the said JOHN McLACHLAN hereby agrees to pay, then this transfer to be void and of no effect; but in case of non-payment of the said debt and interest at the time above mentioned, then the said GEORGE G. WANZER shall have full power to enter upon the premises of the said party of the first part, or any other place or places where the goods and chattels aforesaid may be; (to take possession of said property); to sell the same at public or private sale, and the avails (after deducting all expenses of the sale and keeping of the said property) to apply in payment of the above debt; and in case the said GEORGE G. WANZER shall at any time deem said property or debt unsafe, it shall be lawful for him to take possession of such property and to sell the same at public or private sale previous to the time above mentioned for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses for the sale and keeping of the said property. And the said mortgagee, his representatives or assigns, may purchase at any such sale, in the same manner and to the same effect as a person not interested herein.

If from any cause said property shall fail to satisfy said debt, interest, costs and charges, I covenant and agree to pay the deficiency.

In Witness Whereof, I have hereunto set my hand and seal the 15th day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Sealed and delivered }
in presence of }

JOHN McLACHLAN [SEAL.]

AMOS H. COOLIDGE, Lyons, N. Y.

REMARK.—It is usual to have a chattel mortgage acknowledged, and it is advisable that it should be. The form of acknowledgment already given may be used (p. 249, f. 35). It is necessary to file a chattel mortgage in the office of the town clerk of the town where the property is situated, or in such other office as may be designated by law, in order to make such mortgage valid as against subsequent claimants and purchasers in good faith.

Form No. 55.

ORDINARY FREIGHT RECEIPT.

NEW YORK, ALBANY & ROCHESTER RAILROAD COMPANY.

Syracuse Station, Jan. 4, 1888.

Received from Sherwood & Co., in apparent good condition :

MARKED.	All oils, Molasses or Syrup, Alcohols, Whisky, Liquors or Fluids of any description, entirely at the Owner's Risk of Leakage; and all Machinery, Castings, Furniture, Wagons, Sleigh, and Toy Goods, at Owner's Risk of Chafing and Breakage.	DESCRIPTION OF PROPERTY,	WEIGHT.
T. L. King,			
		25 bbls. Salt.	7500
Rochester,			
N. Y.			
			Weight subject to correction.

As described above, contents and value unknown, to be transported by the NEW YORK, ALBANY & ROCHESTER RAILROAD COMPANY, over the line of this Railroad to their warehouse at Rochester, ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting Company or carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published Tariff of said Company, and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property; and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damage thereto, or any delay in transportation or delivery thereof by any connecting or succeeding Company or carrier.

W. A. LUDOLPH, Agent.

Form No. 56.

Commercial National Bank.

DEPOSITED BY

Rochester, N. Y., 188

	DOLLARS.	CENTS.
Bills,	-	-
Gold,	-	-
Silver,	-	-
Check,	-	-

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. No. 1487.
WAY-BILL OF MERCHANDISE, from Albany to Buffalo, N. Y., Dec, 19, 1887.

No. and Description of Cars.	For Whom and Where.	Description of Articles.	Short Weight.	Aggregate Weight.	Rate.	Prepaid.	Advance'd Charges.	Local Freight.	Payable at Station sent to.	Under Charges.	Over Charges.
3742 B. & A.	D. G. TRUE & Co., Buffalo, N. Y.	1 bx. Leather.		450	10 c.		2 10	4 50	6 60		

Form No. 57.
WAY-BILL.

[14] MERCHANTS DESPATCH TRANSPORTATION COMPANY.

DELIVER AT MARK PACKAGES "MERCHANTS DESPATCH."
OUR DEPOT. { N. Y. C. & H. R. R.R. Freight Office.

For Information and Bills of Lading, apply at office, N. Y. C. & H. R. R.R. Freight Office.

ROCHESTER, N. Y., Jan. 5, 1888.

Received from L. Smith, No. 76 State Street.
In apparent good order (except as noted), the following PACKAGES (contents unknown), marked as in the margin, subject to the conditions on the back of this receipt.

MARKED.

B. Williams,
49 Jones St.,
Chicago, Ill.
One box School Books.

Charges, \$.....

READ THE CONDITIONS ON THE BACK OF THIS RECEIPT.

[14] MERCHANTS DESPATCH TRANSPORTATION COMPANY.

Office N. Y. C. & H. R. R.R. Freight Office.

ROCHESTER, N. Y., Jan. 5, 1888.

Received of L. Smith, No. 76 State Street.
Full Name of Consignee must be given.

MARKED.

B. Williams,
49 Jones St.,
Chicago, Ill.
One box School Books.


Charges, \$.....

Form No. 58.
FAST FREIGHT RECEIPT.

Form No. 59.

RAILROAD BILL OF LADING.

INTERNATIONAL TRANSPORTATION COMPANY.
FREIGHT LINE.

 All articles entered on this Bill of Lading shall be subject to and governed by the Classification as published by Railroads, and to the rates properly belonging to such classification; and the rates as written in below, shall only apply to such Goods as are included in the class opposite or against which the rates are so written in.

MARKS.

W. J. SNELL,

Batavia,

N. Y.

Subject to the order of
Merchants Bank of Geneva,
N. Y.

Charges advanced, \$.....

BILL OF LADING FROM

Geneva, N. Y., to Batavia Depot.

If 1st Class Goods, 15 cts. per 100 lbs.
If 2d Class Goods, 13 cts. per 100 lbs.
If 3d Class Goods, 10 cts. per 100 lbs.
If 4th Class Goods, 8 cts. per 100 lbs.
If Special, cts. per 100 lbs.

Any consignment weighing less than 100 lbs. will be estimated and charged at 100 lbs.

DEPOT:

Corner State and Mumford
Streets.

GENEVA, N. Y., Jan. 6, 1888.

Received from A. Carey & Co., in apparent good order [except as noted] the following PACKAGES [contents unknown], marked as in the margin, viz:

10 bbls. Fish.

(UNDER THE FOLLOWING CONDITIONS.)

It being expressly understood and agreed that in consideration of issuing this through Bill of Lading, and guaranteeing a through rate. The International Transportation Company reserves the right to forward said goods by any Railroad line between point of shipment and destination. The International Transportation Company, or carriers over whose line they are transported shall only be responsible as warehousemen, not as common carriers, while the goods are at any of their stations awaiting delivery to the consignees. They will not be liable for any injury to any articles of freight during the course of transportation, occasioned by the weather, accidental delays, or natural tendency to decay, nor from any loss arising from leakage, improper packing, insufficient cooerage or strapping; nor for any loss or damage on any article or property whatever, by fire, or other casualty, while in transit or while in depots or places of transshipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. No responsibility will be assumed for damage resulting from chafing of goods packed in bales. All necessary cooerage and bailing to be at owners' risk.

No guarantee of special time for delivery of the goods is given—Carriages and Sleighs, Eggs, Furniture, Looking Glasses, Glass and Crockery Ware, Acids, Machinery, Stoves and Castings, Wrought Marble, Musical Instruments, Liquor put up in glass or earthen ware, and all other frail and brittle articles, Fruit and all other perishable goods—will only be taken at the owners' risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed in writing to the contrary. Gunpowder, Friction Matches, and like combustibles and explosives, will not be received except by special agreement, and all persons procuring the reception of such freight without the knowledge of the carrier will be held responsible for any damage which may arise from it. In the event of the loss of any property for which responsibility attaches under this Bill of Lading to the carrier, the value or cost of the same, at the time and point of shipment is to govern the settlement for the same, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based, and said carrier shall have the benefit of any insurance effected by or on account of the owner of such goods. It is further stipulated and agreed that, in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that Company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening thereof. No claim will be allowed for deficiency or damage on packages if receipted for in 'good order' at the point to which they are contracted by this bill. No claim will be allowed that arises from insufficient packing or incorrect or inadequate marking. The acceptance of this Bill of Lading or receipt for goods, made subject to the conditions of this Bill of Lading, makes this an agreement between the International Transportation Company and carriers engaged in transporting said goods and all parties interested in the property. In witness whereof, the agent affirms to 2 Bills of Lading, all of this tenor and date, one of which being accomplished the other to stand void.

D. BANNING, Agent.

REMARK.—Our great railroad systems have incorporated the provisions of their inland Freight Bills and Bills of Lading with those of ocean transit and the Bill of Exchange, calling the new form a Foreign Bill of Lading, and by its provisions as a contract, goods may be shipped to sea-board and thence to any foreign port at a flat price named at the point of departure and payable either there or at the point of destination, thus all extra charges, frequent by old time methods, are avoided, and the shipper here uses this foreign Bill of Lading in its exchange character as he would use any foreign Bill of Exchange by transferring it to any other person, or by negotiating it at a bank.

Form No. 60.

DRAFT TO ACCOMPANY BILL OF LADING.

\$95.00.	Geneva, N. Y., Jan. 6, 1888.	Pay to the Order of	
	At sight,	Cashier, Merchants Bank of Geneva, N. Y.,	
	Ninety-five	Dollars,	
Value received, and charge same to account of			
No. 35.	To W. J. Smith,	A. Carey & Co.	
	Batavia, N. Y.		

REMARK.—When goods are ordered to be shipped by freight, C. O. D., the custom is to have the collection made by a bank. The goods are marked with the name and address of the consignee, subject to the order of the bank by which the collection is to be made. The shipper then procures a Bill of Lading, and having drawn a draft on the consignee favor of the bank, for the amount of the goods, attaches it to the Bill of Lading and either deposits it in the bank or leaves it there for collection. Or he may send it for collection to some bank located in the same city as the consignee.

Form No. 61.

FREIGHT BILL AND FREIGHT RECEIPT.

No. 1487.

BUFFALO, Dec. 24, 1887.

D. G TRUE & Co.,

To The New York Central and Hudson River Railroad Company, Dr.

No payment of this Bill will be valid unless made to the Freight Agent at this Station, or to some person authorized by him to receive payment thereof.

For Transportation from Albany to Buffalo.

<i>One box Leather,</i>		4	50
<i>Door 14,</i>			
<i>No. Car, 3742.</i>	<i>Recived Payment,</i>	Back Charges	
		2	10
W. E. BROWN. <i>Freight Agent.</i>		\$	6 60

N. B.—Payment will be required on delivery of all goods.

No. 1487.

BUFFALO, Dec. 23, 1887.

Received, Dec. 24, 1887, from The New York Central & Hudson River R. R. Company
the following packages in good order, Marked: D. G. TRUE & Co.,
Buffalo, N. Y.

<i>One box Leather.</i>			
<i>Door 14.</i>		<i>Charges, \$6.60.</i>	
<i>No. Car, 3742.</i>		D. G. TRUE & CO.	

Form No. 62.

EXPRESS C. O. D. ENVELOPE.

(22)

No.

COMMERCIAL EXPRESS COMPANY.

\$ 31.75 *for Collection.*\$ *Charges for Return of Money.*\$ *Total Amount to be Returned.*

*From O. B. Henderson Chemical Co.
573 S. Washington St.,
Minneapolis, Minn.*


*On Williamson & Redman,
Binghampton, N. Y.*

Minneapolis, Minn.,

Jan. 6, 1886.

C. O. D.


Bill to be Collected on Delivery of Goods

 Return proceeds in this Envelope, CAREFULLY SEALED, without delay.

Do not deliver the whole or any part of the goods accompanying this bill until you receive pay therefor; and be careful to notice what money you receive, and, as far as practicable, send the same as received, and follow the special instructions of the shippers, if any are given on the bills. If goods are refused, or the parties cannot be found, notify the office from whence received, with names and dates, and await further instructions.

Never forward C. O. D. packages beyond destination without direct orders from the Shipper, through Shipping Office, or until the collection and charges are paid.

N. B.—In cases where the bills do not accompany goods marked C. O. D., retain package and write to the office shipping the goods.

 Agents must comply with the above instructions in every instance.

REMARKS.*Add return charges.*

Form No. 63.

CIRCULAR LETTER OF CREDIT.

No. 3987.

ADDRESSED TO THE CORRESPONDENTS OF

KNAUTH, NACHOD & KUHNE.

£500.

*New York, March 1, 1888.**Gentlemen:*

We beg to introduce and to commend to your kind attention Mr. John H. Andrews, to whom you will please furnish such funds as he may require up to the aggregate amount of Five Hundred Pounds Sterling against his Sight Drafts on *The Alliance Bank, limited, London*, each draft to be plainly marked as "drawn under K., N. & K's L^d Credit, No. 3987."

We engage that such drafts shall meet with due honor in London, if negotiated within Six months from this date, and request you to buy them at the rate at which you purchase demand drafts on London, deducting your charges, if any.

The amount of each draft must be inscribed on the back of this letter, and to this we wish to call your special attention, the letter itself should be attached to the last draft drawn.

Please see to it that the drafts be signed in your presence, and carefully compare the signature with the one below.

We are, Gentlemen,

Your obedient servants,

(Signed)

KNAUTH, NACHOD & KUHNE.

Holder's Signature.

John H. Andrews.

REMARK.—Letters of Credit are usually on double folded sheets, on both inside pages of which appear blanks as given below.

Form No. 63.

Bankers will please inscribe payments in their order on these pages.

<i>Date when paid.</i>	<i>By whom paid.</i>	<i>Name of Town.</i>	<i>Amount paid expressed in words.</i>	<i>Amount in figures.</i>
March 20, 1888.	Bank of Liverpool, Limited.	Liverpool.	Fifty Pounds.	£ 50.
April 5, 1888.	Magquay, Hooker & Co.	Florence.	One Hundred Pounds.	£ 100.
July 3, 1888.	Banque Nationale Bulgare.	Sophia.	Twenty-five Pounds.	£ 25.
August 8, 1888.	Imperial Ottoman Bank.	Damascus.	Seventy-five Pounds.	£ 75.
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
				£
			(Over to next page.)	£

Form 64.

LAND CONTRACT.

This agreement made and entered into at Dunkirk, N. Y., this fifth day of March, 1888, provides as follows :

That in consideration of the sum of two thousand (2000) dollars—to be paid as hereinafter specified—JOHN BROWN, of the city of Dunkirk, N. Y., agrees to convey by full warranty deed to NORMAN C. STULL, of the city of Buffalo, N. Y., the twenty acre tract of land lying four miles west of the city limits of Dunkirk, and known as the hop yard, and described as being the southwest one-fourth of the Stephens tract, as by map of said tract on file in the office of the clerk of Chautauqua county.

It is further provided that the land described shall be conveyed as agreed on or before April 1st, 1888, and that said Stull shall, on receiving from said Brown the deed of conveyance as mentioned, together with a full and complete abstract of title to date of conveyance of said land, pay to said Brown the purchase price in full.

This contract shall be binding upon the parties hereto, their heirs, executors, administrators and assigns.

Witness,

RICHARD PECK.

Signed,

JOHN BROWN,
NORMAN C. STULL.

Form 65.

AFFIDAVIT.

STATE OF NEW YORK, }
County of Livingston. } ss :

AUGUSTUS HAMILTON, being duly sworn (*or affirmed in case the affiant objects to taking an oath*), according to law, says that on the twenty-first day of June, 1888, Calvin Perkins, the defendant, worked the entire day, laying brick for him, the said HAMILTON, on his premises in Livonia, County aforesaid.

Sworn to and subscribed before me this }
thirtieth day of June, 1888. }

AUGUSTUS HAMILTON.

HENRY D. KINGSBURY,
Justice of the Peace.

Form 66.

PROOF OF CLAIM.

STATE OF NEW YORK, }
County of Genesee. } ss :

JOHN G. COBB, being duly sworn, says that (the estate of ASA B. C. DICKINSON, deceased), or (the assigned estate of GEORGE CLAWSON), is justly indebted to deponent, in the sum of one hundred dollars and interest thereon from the 10th day of May, 1887, as specified in the annexed account [or as appears from the note of which the annexed is a copy].

That the said sum of one hundred dollars and interest is now justly due and

owing to deponent; that no payment has been made thereon; that there are no offsets thereto; and that the same is not secured by judgment or otherwise.

Sworn to and subscribed before me this }
23d day of December, 1887.

JOHN G. COBB.

SELMA D. HOLTON,
Notary Public.

Form 67.

BUILDING CONTRACT.

AGREEMENT made this twentieth day of February, 1888, between WALTER N. CLARK, of Batavia, N. Y., of the first part, and THEODORE C. SPENCER, builder, of the same place, of the second part, the said party of the second part covenants to and with the said party of the first part, to make, erect, build, and finish in a good, substantial and workmanlike manner, on the lot belonging to the party of the first part, and known as No. 4 Bank st., in said village of Batavia, one frame house, agreeably to the plans and specifications made by A. J. WARNER, architect, hereto annexed, of good and substantial materials, by the first day of July next, and the said party of the first part covenants and agrees to pay to the said party of the second part the sum of five thousand dollars lawful money, in manner following: two thousand dollars at the beginning of said work; two thousand dollars more when said house shall have been completely roofed, and one thousand dollars more in full for said work when the same shall be completely finished.

And for the true and faithful performance of each and all of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of one thousand dollars, as liquidated damages, to be paid by the failing party.

In Witness Whereof, We have hereunto signed our names and affixed our seals on the day and year first above written.

Witness,	Signed,	WALTER N. CLARK	[SEAL.]
ARCHIBALD DIXON.		THEODORE C. SPENCER	[SEAL.]

Form 68.

SUBMISSION TO ARBITRATION.

Know all men by these presents, That whereas a controversy is now existing between PHILO SMITH, SR., and JOSEPH SNYDER, both of the City of Elmira, N. Y., touching an alleged indebtedness of the latter to the former for services rendered.

Now, therefore, we, the said PHILO SMITH, SR., and JOSEPH SNYDER, do hereby submit the said controversy to the decision and arbitration of DAVID DECKER, of the City of Elmira aforesaid; and we do covenant each with the other that we will in all things faithfully keep, observe, and abide by the decision and award that he, the said DAVID DECKER, may make in writing, in the premises, under his hand, ready to be delivered on or before March 15th, 1888.

And it is further agreed, by the parties hereto, that the party that shall fail

to keep, abide by and observe the decision and award to be made according to the foregoing submission, shall pay to the other the sum of fifty dollars, as fixed liquidated damages, and not as a penalty.

Executed mutually by the parties to this submission this first day of March, 1888.

In presence of DONALD KENNEDY.

PHILO SMITH, SR. [SEAL.]

JOSEPH SNYDER. [SEAL.]

Form 69.

AWARD OF ARBITRATOR.

To all to whom these presents may come, I, DAVID DECKER, to whose arbitration and award was submitted the matters in controversy existing between PHILO SMITH, SR., and JOSEPH SNYDER, of the City of Elmira, N. Y., as appears more fully in their written submission, bearing date the first day of March, 1888. Now, therefore, know ye that I, having been first duly sworn according to law, and having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make, publish and declare this my award in writing; that is to say, I find PHILO SMITH, SR., is indebted to JOSEPH SNYDER in the just and full sum of two hundred and ten dollars. And I direct and award that PHILO SMITH, SR., within one month after service upon him of the notice of this award, pay to the said JOSEPH SNYDER the said sum of two hundred and ten dollars, together with the costs of this arbitration.

In Witness Whereof, I have hereunto subscribed these presents this twelfth day of March, 1888.

In presence of JOEL SISSON.

DAVID DECKER. [SEAL.]

REMARK.—Often three, five, or seven arbitrators are named; in such case it is usual to provide that a majority may bring in an award.

Form 70.

RELEASE.

I, SAMUEL ROGERS, JR., of Waverly, Coffey County, Kansas, for and in consideration of the sum of three hundred (300) dollars, the receipt of which is hereby acknowledged, do hereby release and forever discharge Ralph Holden, of Topeka, Kansas, his heirs, executors and administrators, of, and from all actions, causes of action, suits, claims and demands whatsoever to this date.

In witness whereof, I have hereunto signed my name this fourteenth day of February, 1888.

Witness,

SAMUEL ROGERS, JR. [SEAL.]

EDWIN TUCKER.

Form 71.

EMPLOYMENT CONTRACT.

This agreement made and entered into at Richland, Wisconsin, this twentieth day of February, 1888, by and between JEROME B. GREEN, farmer, and CLAYTON HOPKINS, laborer, both of Richland, Wis., provides as follows :

First.—That said Hopkins shall work as a farm hand on the premises of said Green, and as directed, in the usual manner, and for the usual hours accustomed in farm business, for the period of one year from date hereof.

Second.—For the services provided for, said Green agrees that during said year the said Hopkins may become as one of said Green's family, boarding and lodging therewith, and having all the usual privileges of farm laborers, and at the completion of the year's labor Green shall pay to Hopkins the sum of two hundred and forty (240) dollars in full for his services.

Third.—Neither party hereto shall have a right to terminate this contract before the expiration of the time, except for cause.

Witness,

Signed,

LOUIS H. BARNES.

JEROME B. GREEN,
CLAYTON HOPKINS.

Form 72.

RECEIPT.

ASHLAND, Ky., Mar. 7, 1888.

Received of PHINEAS T. BARNUM, one hundred dollars in full for services to date.

\$100.00

MARVIN D. WARREN.

Form 73.

SUBSCRIPTION PAPER.

We, the undersigned, hereby agree to pay the sums set opposite our respective names to O. C. French, for the purpose of building a parsonage for the Westminster Presbyterian Church Society of Rochester, N. Y.

Alfred Wright,	\$500	Robt. J. Moore, Corlis B. Gardner,	\$200 200
----------------	-------	---------------------------------------	--------------

REMARK.—The signature is binding, as each preceding one is esteemed a consideration for each one following.

Form 74.

OATH OF OFFICE—APPOINTIVE OR ELECTIVE.

I do solemnly swear (or affirm) that I will support the constitution of the United States, and of the State of ———, and that I will faithfully perform the duties of the office of ———, according to the best of my ability.

Elected officers take the above, and with it the following :

And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered, or promised to pay, contributed, or offered, or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and I have not made any promise to influence the giving or withholding any such vote.

Form 75.

APPRENTICESHIP AGREEMENT—GENERAL FORM.

This agreement witnesseth that CHESTER A. GOULD, now fifteen years of age, and with the consent of his father, SETH H. GOULD, does by these presents apprentice himself to MARTIN D. SPENCER, engraver, all parties of Cleveland, Ohio, to learn the art of engraving, from the date hereof unto the fifteenth day of September, 1890.

That he will perform all the duties required by law of him, and otherwise conduct and demean himself as a conscientious, faithful and industrious apprentice ought.

That in consideration thereof, said Martin D. Spencer does hereby covenant, promise and agree to use the utmost of his endeavors to have said apprentice taught the art of engraving aforesaid, and to have in the public schools six months' instruction in the common branches per year, and in the meantime provide said apprentice with all necessaries, including food, lodging, clothing, laundry and medical attendance, and at the expiration of said term to give him two hundred dollars in cash.

In witness whereof said parties have hereunto subscribed their names this fifteenth day of September, 1884.

Signed,

CHESTER A. GOULD,
SETH H. GOULD,
MARTIN D. SPENCER.

Form 76.

APPRENTICESHIP RELEASE.

Know all men by these presents that CHESTER A. GOULD, son of SETH H. GOULD, did by his agreement, bearing date September 15th, 1884, bind himself as an apprentice unto MARTIN D. SPENCER, of Cleveland, Ohio, for a term of six years from date thereof, as by said agreement more fully appears.

That the said CHESTER A. GOULD has since become partially blind, and thus is unable to accomplish the object of his agreement.

That by reason thereof, said MARTIN D. SPENCER does hereby release and forever discharge said CHESTER A. GOULD, and his father, SETH H. GOULD, of and from said agreement, and all service and all other agreements, covenants, matters and things therein contained, on their or either of their parts to be observed and performed, whatsoever, to date hereof.

In witness whereof I have hereunto set my hand this twelfth day of April, 1888

MARTIN D. SPENCER.

REMARK.—The father having died, the mother may become a party to such an agreement; and in case the minor has a guardian he may so act, as may also the magistrates or overseers of the poor, in case the minor is dependent.

Form 77.

WILL.

In the Name of God, Amen. I, JOHN M. WILLIAMS, of the City of Oneida, State of New York, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last WILL AND TESTAMENT, that is to say :

First.—After all my lawful debts are paid and discharged, I give and bequeath to my wife, FLORENCE M. WILLIAMS, in lieu of her dower interests in my estate, the property in the City of Rome, N. Y., known as the Arlington Hotel, together with the barns and grounds adjoining, and all appurtenances connected therewith

Second.—To my son, CHARLES S., I give seventy-one shares of the capital stock of the Oneida Fruit Preserving Company, which now stands in my name on the books of said company ; also one thousand dollars in cash.

Third.—To my son, WALTER L., I give the farm known as the Pearl Creek Place, together with all the crops, stock and utensils which may be thereon at the time of my death.

Fourth.—To my daughter, MABEL E., to whom I gave five thousand dollars January 6, 1885, at the time of her marriage, I now give and bequeath only my family carriage and carriage team, together with the harness, robes and whip therewith belonging.

Fifth.—To my daughter, GRACE B., the wife of John D. Conkling, I give and bequeath only my gold watch and chain, hereby intending to discriminate against her because of her having married contrary to my expressed wishes.

Sixth.—To my sons, CHARLES S. and WALTER L., as trustees, I hereby give and bequeath the ten thousand dollars of U. S. Government bonds now owned by me, the provisions of the trust hereby established being :

1. That the income from said bonds as it shall be collected is to be applied solely to the education of the children of my said daughter, GRACE B., the wife of John D. Conkling ; and,
2. It is further provided that at the maturity and payment of the said bonds, the principal thereof shall by the trustees herein named be reinvested in income bearing bonds approved by the Surrogate of Oneida County ; and,
3. When the youngest of the children of my said daughter, GRACE B., shall become of age, the trustees herein named shall sell in the open market such bonds as they then hold as trustees and divide the proceeds of such sale among the children of my said daughter, GRACE B., share and share alike.

Seventh.—I hereby give and bequeath my law library, with all pamphlets and notes in manuscript found therewith, to the Law Library of Cornell University, at Ithaca, New York.

Eighth.—All the residue of my property, both personal and real, I give and bequeath to my beloved wife, FLORENCE M. WILLIAMS, in addition to the estate

hereinbefore mentioned as bequeathed to her, and intend hereby to name and constitute my said wife my residuary legatee.

Likewise, I make, constitute and appoint my wife and my son, CHARLES S., to be co-executors of this my last Will and Testament, hereby revoking all former Wills by me made.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, the seventh day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN M. WILLIAMS. [SEAL.]

The above written instrument was subscribed by the said JOHN M. WILLIAMS in our presence, and acknowledged by him to each of us; and he at the same time declared the above instrument, so subscribed, to be his last Will and Testament; and we, at his request, have signed our names as witnesses hereto, in his presence and in the presence of each other, and written opposite our names our respective places of residence.

GEORGE G. FLEMING, 30 Clinton St., Oneida, N. Y.

MARY T. BLY, 63 Knox St., Oneida, N. Y.

ROBERT S. WILLIS, 299 West Ave., Rochester, N. Y.

CODICIL TO THE FOREGOING WILL.

Whereas, I, JOHN M. WILLIAMS, did on the seventh day of February, 1888, make my Last Will and Testament, I do now, being of sound mind and memory, add this codicil to my said Will and to be taken as a part thereof:

First.—I hereby ratify and confirm my said Last Will and Testament in every respect, save so far as any part of it is inconsistent with or expressly revoked by this codicil.

Second.—Section second of my said Will is hereby changed by revoking that clause thereof which provided for a bequest of one thousand dollars to my son, CHARLES S.; and I now hereby give and bequeath one thousand dollars to my daughter, GRACE B. CONKLING, to be used by her independent of control from her husband.

Third.—I do give and bequeath to the trustees of the Central Presbyterian Church Society of Rochester, N. Y., to be used for the establishment and maintenance of missions, the six thousand dollars that since the execution of my said Last Will and Testament I have inherited from the estate of my deceased brother, Roger.

In Witness Whereof, I hereto affix my seal and signature this first day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and declare this to be a codicil to my said Will and amendatory thereof.

JOHN M. WILLIAMS. [SEAL.]

The above written instrument was subscribed by the said JOHN M. WILLIAMS in our presence, and acknowledged by him to each of us; and he at the same time declared the above instrument, so subscribed, to be a codicil to his Last

Will and Testament ; and we, at his request, have signed our names as witnesses hereto, in his presence and in the presence of each other, and written opposite our names our respective places of residence.

WILLIAM H. PECK, Cazenovia, N. Y.

SARAH J. BROWN, 69 Seneca St., Oneida, N. Y.

WALTER A. BROWNELL, 125 University Ave., Syracuse, N. Y.

REMARKS.—A codicil should be executed in the same manner as the will.

Minors above certain ages prescribed by law, usually eighteen for males and sixteen for females, may dispose of personal property by will, but possess no testamentary power in regard to real estate.

All wills should be executed according to the form required in the State wherein the property disposed of is located ; if property be in several States, observe the peculiar requirements of the laws of all such States. Minors of understanding and women may act as witnesses, but a devisee or legatee should not witness a will, Usually, a seal is not required, but it can do no harm.

GLOSSARY.

- Abandonment.** In marine insurance, the giving up of property partly destroyed, by the owner to the insurer.
- Abolish.** To make void; to cancel.
- Abrogate.** To repeal; to annul; to abolish entirely.
- Acceptance.** In mercantile law. (1) The act by which the person upon whom a bill of exchange or other order is drawn, engages to pay it. (2) The bill after it has been accepted.
- Acceptor.** One who accepts an order, a draft, or bill of exchange.
- Accommodation Paper.** Commercial paper for which no consideration passed between the original parties.
- Accord.** Agreement.
- Acknowledgment.** The act by which a party who has executed an instrument declares or *acknowledges* it before a competent officer to be his or her act and deed.
- Action.** The formal means of recovering one's right in a court of justice — a suit.
- Act of God.** Any accident produced by a physical cause which is irresistible, such as lightning, tempest, etc.
- Administrator.** One who administers on the property or estate of a person dying intestate, and is accountable for the same.
- Affreightment.** The hiring of a ship for the conveyance of goods.
- Affinity.** The connection which arises by marriage between each of the married pair and the kindred of the other.
- Agency.** The relation existing between two parties, by which one is authorized to do certain acts for the other, with other parties.
- Agent.** Any person who is employed by another to do any act for the employer's benefit or account.
- Age of Consent.** The age at which infants are capable of making a valid contract of marriage.
- Alien Enemy.** An alien who is the subject of a hostile power.
- Alimony.** An allowance made to a wife out of her husband's estate during a suit for divorce or separation, or at its termination, for her life or for a shorter period.
- Amotion.** Removal of an officer of a corporation.
- Ante-dated.** Dated at a time earlier than the actual date.
- Annulment.** The act of making void.
- Appurtenances.** Things belonging to another thing as principal.
- Arbitration.** The investigation and determination of a cause or matter in controversy by an unofficial person, or persons mutually chosen by the contending parties.
- Articles of Copartnership.** The written agreement by which a copartnership is formed.
- Assault.** An illegal and forcible attempt or offer to do a bodily harm to another.
- Assent.** Act of agreeing to anything; consent.
- Assets.** Property available for the payment of debts.
- Assignee.** The person to whom the failing debtor transfers all his remaining property for the purpose of having it distributed among his creditors. One to whom anything is assigned.
- Assignment.** A transfer by a failing debtor of his property to an assignee. A transfer by one person to another of any property, personal or real.
- Assignor.** One who assigns property.
- Assurance and Assured.** Same as *Insurance* and *Insured*.
- Award.** The decision of arbitrators.
- Bailment.** A delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. The *bailor* is he who delivers; the *bailee*, he to whom delivery is made.

Bank Bill. A written promise to pay to the bearer on demand a certain sum of money, issued by a bank and used as money.

Bank Note. Same as *Bank Bill*.

Bankruptcy. The condition of one who is unable to pay his debts as they fall due.

Barratry. Any breach of duty committed by the master of a vessel or the seamen, without the consent of the owner, by reason of which the ship or cargo is injured.

Barter. To trade by exchange of goods, in distinction from trading by the use of money.

Beneficiary. (1) In life insurance, the person to whom a policy is made payable. (2) The person for whose benefit another holds the legal title to real estate.

Beyond Seas. Denotes absence from the country, and generally held to mean absence from the particular state.

Bill of Exchange. A direction in writing, by the person who signs it, ordering the one to whom it is addressed to pay a third person a definite sum of money at a specified time.

Bill of Lading. A document delivered by a carrier to one sending goods by him, acknowledging that they have been received by him for transportation to a certain place. It is both a receipt and a contract.

Blank Indorsement. One in which no particular person is named as the one to whom payment is to be made. It consists of the indorser's name alone.

Bond. A written and sealed instrument by which one agrees to pay to another a certain amount of money, unless something else specified therein is done.

Bottomry Bond. An obligation given for a loan upon a vessel and accruing freight.

Breach. In the law of contracts, the violation of an agreement or obligation.

By-Bidder. A person employed to bid at auctions in order to raise the price of articles to be sold.

By-Laws. The private laws, or regulations made by a corporation for its own government.

Capital Stock. The fund or property, as a whole, contributed or supposed to have been contributed to a corporation at its organization, as its property.

Caveat Emptor. Latin phrase, meaning "let the purchaser beware," and applies to a case in which the thing sold is before the buyer and he examines it.

Certificate of Deposit. A certificate issued by a bank or banker, showing that a certain sum of money has been deposited there, payable to a certain person, or to his order, or to the bearer.

Certificate of Stock. A certificate given by the proper officers of a corporation, showing that a certain person owns a certain number of shares of the capital stock.

Certification (of check). The signature of the proper officer of the bank written across its face, sometimes with and sometimes without the word "certified," or "good." It is a recognition of the check by the bank as good in two particulars, viz: (1) That the drawer's signature is genuine, and (2) That he has that amount of money in the bank.

Charter. (1) A special act of legislature creating a particular corporation. (2) To hire or let a vessel or part of it.

Chartered Ship. One let wholly or in part.

Charter Party. The written instrument by which the owner of a vessel lets it, or a part of it, to another.

Chattel Mortgage. A conditional sale of personal property, one which is to become void if a certain thing happens. Chiefly used as a security for the payment of money.

Chattels. Commonly means goods of any kind, or every species of personal property.

Check. A written order for money drawn upon a bank or banker, and payable immediately.

Chose in Action. A thing of which one has not the possession, but only a right to demand it by action at law.

Chose in Possession. Personal property of which one has the actual possession.

Civil Law. The system of law of ancient Rome.

Civil Remedy. The method of redressing an injury inflicted by one person upon another.

Collateral. Property pledged as security for the performance of a contract.

Common Carrier. One who, as a business, undertakes for hire to transport from place to place, passengers or goods of all who choose to employ him.

Common Law. The unwritten law as distinguished from written or statute law. The old law of England that derives its force from long usage and custom.

Competency. The legal fitness of a witness to give evidence on the trial of an action.

- Composition Deed.** An agreement between an insolvent debtor and his creditors by which upon payment to each of some fixed proportion of his claim, they all agree to release the debtor from the balance of their claims.
- Compromise.** An agreement between a debtor and his creditors, by which they agree to accept a certain proportion of the amounts due, and discharge him from the remainder.
- Concurrent.** Existing together, a consideration is concurrent when the acts of the parties are to be performed at the same time.
- Condition Precedent.** An act which must be performed by one person before another is liable, or in order to make him liable.
- Consanguinity.** Relation by blood.
- Consideration.** The reason or inducement in a contract upon which the parties consent to be bound.
- Consignee.** One to whom merchandise, given to a carrier by another person for transportation, is directed.
- Consignor.** One who gives merchandise to a carrier for transportation to another.
- Conveyance.** (1) The act of carrying by land or water. (2) The means of conveyance. A written instrument by which an estate in lands is transferred from one to another.
- Copartnership.** Same as partnership.
- Corporation.** An artificial being or person endowed by law with the capacity of perpetual succession, and of acting in certain respects like a natural person. When it consists of one individual it is termed a corporation *sole*, and when composed of a collection of several individuals it is called a corporation *aggregate*.
- Counter-Claim.** Same as *Set-off*.
- Course of Exchange.** The current price of bills of exchange between two places.
- Covenant.** Any promise contained in a sealed instrument. The person to whom the promise is made is the *Covenantee*.
- Coverture.** The legal state and condition of a married woman.
- Criminal Remedy.** The method of punishing a wrong-doer for some wrong committed by him against society.
- Curtsey.** The estate a man has in the lands of his wife upon her death, in case a living child has been born to them during their marriage.
- Damages.** Compensation in money to be paid by one person to another for an injury inflicted by the former upon the latter.
- Day.** Twenty-four hours. An entire day.
- Days of Grace.** Days (usually three) allowed by custom for the payment of bills and notes beyond the day expressed for payment on the face of them.
- Default.** Omission; neglect or failure.
- Defense.** The answer made by the defendant to the plaintiff's action, by demurrer or plea at law.
- Demand.** Presentment for payment.
- Demurrage.** The allowance to be made by the shipper to the vessel owner as damages for detention of the vessel beyond the time specified in the charter party.
- Deposit.** A bailment or delivery of goods to be kept and returned without recompense.
- Deviation.** In the law of marine insurance, a voluntary departure without necessity from the regular course of the specific voyage insured.
- Disability.** Want of qualification; incapacity to do a legal act.
- Disaffirmance.** The annulling or cancelling of a voidable contract.
- Discount.** (1) The taking of interest in advance. (2) A deduction from a price asked, or from an account, debt, or demand.
- Disfranchisement.** Expulsion of a member from a corporation.
- Dishonor.** The non-payment of negotiable paper when it is due.
- Distress.** The taking of personal property to enforce the payment of something due, as rent.
- Divorce.** The separation of husband and wife by the sentence of the law.
- Domestic Relations.** The relations of the members of a household or family.
- Dower.** The right of a widow to the use or ownership of some portion of the real estate owned by her husband.
- Draft.** Same as bill of exchange.

- Drawee.** The person upon whom a bill of exchange is drawn, who is directed to make the payment.
- Drawer.** The person who draws or makes a bill of exchange.
- Duress.** Personal restraint or compulsion.
- Easement.** The right to use another's land.
- Effects.** All kinds of personal property.
- Emblements.** Growing crops of any kind produced by expense and labor.
- Eminent Domain.** The right of the sovereign power to take private property for public purposes.
- Enact.** To make a law or establish by law.
- Equity of Redemption.** The right which a mortgagor has to redeem his estate after the mortgage has become due.
- Escheat.** The reverting of land to the State upon the death of the owner without lawful heirs.
- Escrow.** A deed or bond delivered to a third party to be held and delivered to the grantee or creditor upon the performance of some condition.
- Estate.** An interest in property.
- Executed, (of a contract).** Finished.
- Execution.** (1) A written command issued to a sheriff or constable, after a judgment, directing him to enforce it. (2) The act of signing and sealing a legal instrument, or giving it the form required to make it a valid act.
- Executory (of a contract).** Unfinished.
- Fee Simple.** Full ownership in lands.
- Feud.** An estate in land, held of a superior by service; a fief.
- Feudal System.** The system of feuds or fiefs.
- Firm.** All the members of a partnership taken collectively.
- Foreclosure.** The process of cutting off the right or interest of the mortgagor and his assignees in mortgaged premises.
- Forfeiture.** A loss of property, right, or office, as a punishment for some illegal act or negligence. Sometimes used for the thing forfeited.
- Forgery.** The fraudulently making or altering of a written instrument.
- Franchise.** A privilege, or right, conferred by grant from government upon individuals.
- Fraud.** Any cunning, deception, or artifice used to circumvent, cheat, or deceive another.
- Freight.** The compensation to be paid a carrier for the transportation of goods, or the goods themselves while being transported.
- General Average.** A contribution made by the owners of a vessel and cargo toward the loss sustained by one of their number, whose property has been sacrificed for the general safety.
- General Ship.** A vessel navigated by its owner, receiving and carrying freight indifferently for all who apply.
- Goods.** Same as *chattels* and *effects*.
- Good Will.** Benefit arising from the successful conduct of business by a certain person or firm, usually in a certain place; it is a property subject to transfer.
- Guaranty.** A contract whereby one person engages to be answerable for the debt or default of another person. *Guarantor* is he who makes the guaranty.
- Guardian.** One who is entitled to the custody of the person or property of an infant.
- Guest.** A person received and entertained at an inn or hotel.
- Idiot.** One who never had reasoning power.
- Inchoate.** Incipient; incomplete.
- Incompetency.** Lack of necessary legal qualifications.
- Incorporate.** To form into a corporation.
- Indemnity.** Compensation for damage suffered, or that which is given or promised to a person to prevent his suffering damage.
- Indorsement (of commercial paper).** (1) A name, with or without other words, written on the back of the paper. (2) The agreement implied in one's writing his name on the back of commercial paper, to pay it if the principal debtor does not. The one who makes the indorsement is called the *indorser*. The person in whose favor the indorsement is made is called the *indorsee*.

Infant. In law, is one under the age of twenty-one years.

Injunction. An order or direction of the court compelling a certain person to refrain from doing some particular act or thing.

Insolvency. Same as *Bankruptcy*.

Insurable Interest. Such an interest in the thing insured that the person possessing it may be injured by the risk to which the thing insured is exposed.

Insurance. A contract of indemnity against loss from certain causes. The *insurer* is the party agreeing to make the insurance.

Invalid. Of no legal force.

Inventory. (1). An account or catalogue of goods or movables. (2). In law a list or schedule in writing of the goods, chattels, and credits (and sometimes of the real estate) of a testator or intestate, made by an executor or administrator.

Joint-Stock Company. A species of partnership.

Judgment. The sentence of the law pronounced by the court upon any matter contained in the record, or in any case tried by the court.

Judgment Debtor. Party against whom a judgment is obtained.

Landlord. (1) One who owns and rents or leases lands or houses. (2) The host or keeper of an inn; an inn-keeper.

Law Merchant. The general body of usages in matters relative to commerce.

Lease. A contract by which one grants to another for a period the use of certain real estate.

Legal Tender. That kind of money which by law can be offered in payment of a debt.

Letter of Credit. A written direction by some well-known banker authorizing the party to whom it is addressed to draw upon him in a particular manner for any amount he chooses up to a specified limit.

Libel. To defame by published writing, printing, signs, or pictures.

Lien. A right which one person has to retain the property of another by way of security for a debt or claim.

Liquidate. To pay; to settle an account.

Litigation. The act of litigating; judicial contest; a suit at law.

Lucid Intervals. Periods from time to time in cases of lunacy in which the person afflicted becomes sane.

Lunatics. Persons who have lost their reason.

Maintenance. Support by means of food, clothing, and other conveniences.

Mandate. A bailment of personal property in which the bailee undertakes without compensation to do some act for the bailor in respect to the thing bailed. The bailor is generally termed the *mandator*, and the bailee the *mandatary*.

Maturity. The time at which commercial paper legally becomes due.

Merger. The absorption or extinguishment of one contract in another.

Minor. Same as *Infant*.

Misdemeanor. A lower kind of crime; an indictable offense not amounting to felony.

Misuser. The abuse of any liberty or benefit.

Month. Generally in this country, where used in contracts, means a calendar month.

Mortgage. A grant or conveyance of an estate or property to a creditor, for the security of a debt, and to become void on payment of such debt. The *mortgagor* is the one who gives the mortgage upon his property; the *mortgagee* the one to whom the mortgage is given.

Municipal. Of or belonging to a city; but *municipal law* is the name given to the system of law of any one nation or State.

National Currency. National Bank bills.

Negotiable Paper. An instrument as a bill or note, which may be transferred from one to another by assignment or indorsement.

Nominal Damages. Those given for the violation of a right from which no actual loss has resulted.

Nonuser. A failure to use rights and privileges.

Notary Public. An officer appointed variously under the laws of different States, whose acts are respected by the law-merchant and the law of nations, and hence have force out of their own State or country.

Open Policy. One in which there is no valuation of the thing insured.

- Oral Contract.** An agreement made by means of spoken words.
- Ordinance.** A rule, or order, or law. Usually applied to the acts or laws passed by the common council of a city.
- Outlawed.** A debt is said to be outlawed that has existed for a certain length of time, after which the law on that ground alone prevents its being enforced.
- Parol Contract.** Any agreement not under seal. It is often used as synonymous with oral contract.
- Partnership.** The relationship resulting from an agreement between two or more persons to place their money effects, labor and skill, or some or all of them, in some enterprise or business, and divide the profits and bear the losses in certain proportions.
- Party-Wall.** A wall common to two adjoining estates.
- Pawn.** Same as *Pledge*.
- Payee.** The person to whom the payment of any kind of commercial paper is directed to be made.
- Penalty.** Forfeiture, or sum to be forfeited, for non-performance of an agreement.
- Per Centum or Per Cent.** By the hundred.
- Perils of the Sea.** All the dangers naturally incident to navigation.
- Perjury.** A willfully false statement, by one who is lawfully required to depose the truth, and who is lawfully sworn, made in a judicial proceeding, and in relation to a matter that is material to the point in question.
- Personal Property.** Consists of such things as are movable, and may be taken by the owner wherever he goes.
- Piracy.** Any forcible robbery or deprivation, on the high seas, done without lawful authority, and with wrongful purpose.
- Pledge.** A bailment of personal property to secure the payment of some debt or the fulfillment of some agreement. The bailor is called the *pledgor*, and the bailee the *pledgee*.
- Policy.** The written contract of insurance.
- Post-Dated.** Having a date subsequent to that at which it is actually made.
- Power of Attorney.** A written instrument under seal by which one party appoints another to be his attorney, and empowers such attorney to act for him.
- Premium.** The consideration or price paid for insurance.
- Prescription.** The right to a thing derived from immemorial usage.
- Presumption.** An inference of the law, from certain facts, of the existence or truth of some other fact or proposition.
- Prima Facie.** Literally, at the first appearance. *Prima facie* evidence is that which is sufficient to establish a fact, unless it be rebutted or contradicted.
- Principal.** (1) A party for whom another is authorized to do certain acts with third parties. (2) A sum of money at interest.
- Promissory Note.** A written promise, signed by the person promising, to pay a certain sum of money at a certain time to a person named, or to his order, or to the bearer.
- Prosecute.** To proceed against by legal measures.
- Protest.** A formal declaration in writing by a notary public of the demand and refusal to pay a note or bill.
- Proxy.** (1) One who represents another. (2) A writing by which one authorizes another to vote in his place.
- Public Enemies.** Those who belong to a nation at war with another.
- Puffer.** Same as *By-Bidder*.
- Quasi.** As if; as though. *Quasi* corporations are bodies like corporations and yet are not strictly corporations.
- Ratification.** Giving force to a contract made by the person in question, but not now in force, or by another man as his agent.
- Real Estate.** Same as real property.
- Real Property.** That which is fixed or immovable, and includes land and whatever is erected or growing upon it, with whatever is beneath or above the surface.
- Realty.** Same as real property.
- Receipt.** A written acknowledgement by one receiving money or other property that it has been received.
- Receiver.** Usually means a person appointed by a court to take and hold property in dispute, or the property of a bankrupt.

- Recoupment.** A reduction or diminution of damages in an action on contract for breach of warranty or defects in performance.
- Re-enact.** To enact anew.
- Registry.** The entering or recording of real estate conveyances in books of public record.
- Release.** An instrument in the general form of a deed that in distinct terms remits the claim to which it refers; and being under seal, although reciting only a nominal consideration, extinguishes the debt.
- Remedy.** The legal means employed to enforce a right or redress an injury.
- Rent.** Compensation for the use of real property.
- Rescission.** The annulling or dissolution of contracts by mutual consent, or by one party because of a breach of the contract by the other.
- Respondentia Bond.** The obligation given for a loan made upon the cargo of a vessel.
- Revert.** To fall again into the possession of the donor, or of the former proprietor.
- Right of Survivorship.** This means that the survivor or survivors take the right or interest of their deceased joint tenant, which in other cases would go to his heirs.
- Salvage.** Property saved from wreck or loss at sea; or compensation given for service rendered in saving it.
- Satisfaction.** Payment of a legal debt or demand; the discharging or cancelling of a judgment or a mortgage, by paying the amount of it.
- Scrip.** Certificate of stock.
- Seal.** An impression upon any impressible substance; or a piece of paper pasted on with intent to make a seal of it.
- Sea Worthiness.** The fitness of a vessel in all respects of materials, equipment and construction for the service in which it is employed.
- Set-Off.** A claim which one party has against another who has a claim against him; a *counter-claim*.
- Severalty.** A state of separation. An estate in severalty is one held by one person in his own right.
- Shipper.** One who gives merchandise to another for transportation.
- Slander.** Injurious words spoken of another, but not published.
- Smart Money.** Damages beyond the thing sued for, allowed on the ground that the offense may be so great that the offender ought to be made an example of.
- Specialty.** A contract under seal.
- Statute.** An act of the Legislature.
- Statute of Frauds.** An English statute, generally re-enacted in this country, requiring certain contracts to be made in writing, designed to prevent fraud and perjury.
- Statute of Limitations.** A statute requiring an action to be commenced within a certain time after the demand has arisen. It *limits* the time to sue, hence its name.
- Stock.** Same as *Capital Stock*. It is also used to denote the shares into which the Capital Stock is divided.
- Stockholder.** The owner of one or more shares of the stock of a corporation.
- Stoppage in Transitu.** A stoppage, by the seller, of goods sold on credit before reaching their destination upon learning of the buyer's insolvency.
- Subject-Matter.** The thing to be done or omitted in a contract.
- Subrogation.** The substitution of one person or thing in the place of another, particularly the substitution of one person in the place of another as a creditor, with a succession to the rights of the latter.
- Suit.** The prosecution of some claim or demand in a court of justice.
- Surety.** One who has agreed with another to make himself responsible for the debt, default, or misconduct of a third party. Similar to *guarantor*.
- Suretyship.** The liability or contract of a surety.
- Surrender Value.** The amount which an insurance company will pay for an unexpired policy.
- Tenant.** One to whom another has granted for a period the use of certain real estate.
- Tender.** An offer of a sum of money in satisfaction of a debt or claim, by producing and offering the amount to the creditor and declaring a willingness to pay it.
- Tort.** A private wrong or injury other than the breach of a contract.

Trespass. Any wrongful act of one person whereby another person is injured.

Trustee. One who holds property for the benefit of another.

Underwriter. Same as *Insurer*.

United States Note. A written promise to pay to the bearer on demand a certain sum of money, issued by the United States Government and used as money.

Usury. Illegal interest.

Validity. Legal strength or force ; the quality of being good in law.

Valued Policy. One which fixes the value of the property insured.

Vassal. One who held property of a superior or lord.

Vendee. One to whom anything is sold ; a purchaser ; a buyer.

Vendor. A seller ; the person who sells a thing.

Void. Of no force or effect. .

Voidable. That may be avoided ; not absolutely void.

Waiver. The abandonment of a right, or a refusal to accept it.

Ward. A minor under guardianship.

Warranty. An agreement to hold one's self responsible, if a certain thing does not turn out as represented.

INDEX.

Abandonment. See *Marine Insurance*.

Abbreviations. How understood in contracts, 37.

Absence of Debtor. How it affects the running of Statute of Limitations, 56.

Absolute Divorce. What it is, 236.

Acceptance of a proposition. What it is, how indicated, and when must be given, 21. Presentment of bills for acceptance (see *Presentment for Acceptance*). Acceptance of bills of exchange, collateral and qualified, 93. Drawee is bound to accept or return bill within 24 hours after presentment, 93.

Accident Insurance. See *Life Insurance*.

Accommodation Paper. Rights of person to whom given, 88.

Accord and Satisfaction. What it means, 25, 50. When balance of debt may be released, and when not, 45. When part payment constitutes it, 50, 51. Accord executory and executed, 50.

Acknowledgment. See *Deed*.

Act of God. Expression how used in law, 44.

Adjustment of marine insurance losses, 220.

Administrator. Power of in regard to indorsement, 81.

Adulteration of Food. Sale of material for, 122.

Affinity. See *Marriage*.

Affirmative Warranty. Definition and use of, 220.

Affreightment. See *Shipping*.

After Sight. Meaning of, 65.

Agency. Its importance and definition, 124. Upon what doctrine of law based, 124. How divided, 125. Relation between principal and agent, 131. Dissolution of (see *Dissolution of Agency*). Duties, liabilities, and rights of principal (see *Principal*). Duties, liabilities, and rights of agent (see *Relation between Principal and Agent*).

Agent. Definition of, who may be one, and how appointed, 124. Authority of one appointed by parol, 124. Frequent manner of appointment, 124. Formal way, and what power it confers, 124. Authority of, how proved, 125. General agent, definition of, authority how measured, and how affected by private instructions, 126. Who suffers for fraudulent acts of, 126. Special agent, definition of, authority of, and how far he may bind principal, 126. Unauthorized act of, not binding upon principal, 128. Implied powers of agent concerning buying and selling on credit, warranty, receiving payment, employing broker, etc., 126. Person dealing with agent must understand his authority, 123. Notice to agent is notice to principal, and *vice versa*, 127. Knowledge of acts of agent chargeable to principal, 127. Agent liable to principal generally, 129. Where he acts fraudulently or unlawfully, is liable as wrong-doer, 129. Liable to principal for non-performance of duty, or neglect, 129. Liable to third parties when principal is not known, 129. When he expressly agrees to be responsible, 129. When he exceeds his authority, 129. When there is no responsible principal, 130. Where certain classes of agents are generally held liable, as masters of ship, agents acting for principals in foreign countries, etc., 130. Public officers as agents (see *Public Officers*). Duties, liabilities, and rights of agent (see *Relation between Principal and Agent*). Renunciation of authority by agent, what it terminates, and when may be done, 134. How appointed by corporations, 161. How agent may avoid personal responsibility in indorsing, 83. Signature of agent, how should be made, 77. Agent may transfer by indorsement, 81.

Age of Consent. As affecting marriage contract, 231.

Agistors. Definition, duties, and liabilities of, 187.

Agreements Not to be Performed Within One Year. What Statute of Frauds requires concerning, 84.

Alien Enemies. Definition of, rule in regard to contracts made by, with reason for, 20.

Alterations. When they render contracts void, 52. Question of time of making important, 52. When made before execution, fact should be stated at close of contract, 52. Law concerning change made in body of note or bill, 98.

- Amotion.** What it means, importance formerly and now, 162. What officers may be removed at any time, 162.
- Amount.** In negotiable paper must be definite, 78. How it should be indicated, 78. Amount of purchase price necessary to bring sale of personal property within Statute of Frauds, 106, 107.
- Annual Crops.** When considered personal property, 11.
- Annulment of marriage,** 237.
- Application of Payments.** See *Payment*.
- Appointment of Agent.** See *Agent*.
- Appurtenances.** Meaning and use of term, 239.
- Arbitration and Award.** Manner of settling disputes, 52.
- Articles of Copartnership.** Description of, and how executed, 137.
- Assault and Battery.** Actions for, not assignable, 25.
- Assent.** What constitutes mutual assent, 21. Two elements of mutual assent, 21. Time, an important factor in assent, 21. When law implies assent, and when not, 22. Must be freely given (see *Duress*). Mutual assent necessary in sales of personal property, when and how given, 105, 106. Necessary condition of a partnership, 143.
- Assets.** Definition of, 151. Administration of partnership assets, 152.
- Assignee.** Requirements of, in order to take good title where assignor had none, 86.
- Assignment.** General rule as to assignment of choses in action, 25. Causes of action of a personal nature are not assignable, 25. Fraudulent assignments of debtors in failing circumstances, 33. Law in regard to preferred creditors, 33. Assignment of life insurance policies, 207. Of fire insurance policies, and property insured, 215. Of thing insured in marine insurance, 219. Of mortgages, 252.
- Assurance and Assured.** Same as what terms, 205.
- Authority of Agent.** How proved, 125.
- Authority of Laws.** Relative rank of, 9.
- Auctions.** When puffers are legal, and when illegal, 33. When buyer may avoid purchase, 33. Rights of owner of property sold, 33. Law as to written agreements of sale (see *Statute of Frauds*).
- Award.** Meaning of, when binding, 52.
- Baggage.** Rules concerning, 194.
- Bailee.** Party to contract of bailment, 177. Duties, rights, and liabilities of (see *Bailments*).
- Bailments.** Definition of, and parties to contract of, 177. Classes of, 177. Deposit, what it is, consideration upon which law binds bailee, rights of a bailee without compensation, what parties are called, 177. Duties of one taking into custody lost property, and the special right acquired by him in regard to holding it against all but owner, 177. One holding lost property is not ordinarily entitled to compensation, exception in some states, right to reward offered, 177. In deposit bailee is liable how far, rule in regard to special agreements, 178. Rule as to use of thing deposited, 178. When Depositary is obliged to return deposit, and in what condition, 178. Rule in regard to increase or profit, 178. To whom bailee must return property, and law in case bailor is not owner, 178. Law where there are joint-bailors, and joint-depositaries, 178. Bailee liable to bailor when in default, 178. Bailee entitled to what money, 179. Commission, or mandate, how created, names of parties, principles same as in deposit, 179. Mandatary must render what account, 179. Law as to increase, expenses, etc., same as in deposit, 179. Loan for use, what it is, and example of, 179. Bailee liable to what extent, 179. When borrower is liable for loss, and when not, 180. When and where loan must be returned, 180. Revocation of gratuitous bailments, 180. Pledge, definition of, and names of parties, 181. What property may be pledged, the one exception, 181. What is necessary to complete contract of pledge, 181. How goods in transit are delivered, and what such delivery is called, 181. Delivery of heavy and unwieldy articles, 181. Delivery of stocks, choses in action, and negotiable paper that needs no indorsement, 182. Difference between pledge and mortgage, 182. Pledge binds pledgee, how far, 182. Law in regard to using thing pledged, 182. Pledgee's interest in pledge, how great, and how far may be defended, 182. Pledge is security for what debt, 182. Debt may be assigned with pledge, 182. Pledgee's interest depends upon what, 182. Pledgee's right of sale, preliminaries to sale, 182. How sale is conducted, and law of notice, 183. Pledgee cannot be purchaser, 183. When pledgee has right to sell, 183. Exception to necessity for sale, 183. When pledgee becomes liable for loss of property, 183. When pledgor may redeem pledge, and when pledgee must surrender it, 183. Law in case of death of either party, 183. Bailment for hire, definition and

importance of, 184. How divided, 184. Hire of things, what it means, 184. Rule of liability, for what loser is held responsible, 185. Rule in case of loss, 185. Who answerable for negligence of servants, 185. Letter's duty, 185. Hirer's duty, rule in case of any breach of contract, has special property in thing bailed, 185. Rule as to return of property and payment for hire, 185. What terminates this kind of bailment, 185. Hire of services, contract how created, 185. Liability for loss, general rule, 186. Duties of bailor, 186. Duties of workman, as to time, employing other workmen, and material used, 186. Degree of skill required of bailee, 186. General statement of rule, 186. Part performance, rights of bailee in case of, 187. Hire of custody, definition of, 187. Warehouseman, liability of and right of lien, 187. Wharfinger, what he is, his responsibilities, and right of lien, 187. Forwarders, what they are, duties and responsibilities of, 187. Agistors, definition of, duties and responsibilities of, 187. Hotels, taverns, and inns (see *Innkeepers*). Common Carriers (see *Common Carriers*).

Bailor. Definition of, 177. Duties, liabilities, and rights of (see *Bailments*).

Bank. How uses bills of exchange, (9. Duty of in presenting bills of exchange for acceptance, 93. Bound by acts of officers and agents, 162. When officers may be removed, 162. For what amount stockholders are liable, 166.

Bank Bills. What they are and how secured, 72. As accommodation paper, 88. National (see *National Bank Bills*).

Bank Notes. What they are, and form of, 71.

Bankruptcy. When it terminates agency, 134.

Barratry. How defined, and used, 218.

Barred by Statute of Limitations. Meaning of, 55.

Barter. What it is, early use of, 105.

Beneficiary. Definition of, 205. One for whom a trust is created, 241.

Benefit and Loss. Both included in a contract, 25.

Bets. (See *Wagers*).

Beyond Seas. Legal meaning of, 56.

Bill of Exchange. Origin of, oldest form of negotiable paper, 64. Definition of, kinds, and parties to, 65. How transferred, 66. Liability of parties, 67. In what currency payable, 68. Importance in commercial world, 68. Method of using formerly and now, 68, 69. Necessary conditions to make negotiable, 77. Presentment for acceptance, when and where, 92. Acceptance of, 93. Proceedings on non-acceptance, 94. Presentment of, for payment, 95.

Bill of Lading. See *Shipping*.

Boarder. As distinguished from guest, 189.

Boarding House. What persons it may receive, 189. How differs from hotel, 190.

Body of Law. What constitutes it, 7.

Body of Municipal Law. What constitutes it, 9.

Borrowed Property. Laws concerning, 179, 180.

Bottomry Bond. How used, 200.

Breach of Contract. How defined, 42. Compensation for, 59. Breach of warranty in sales of personal property, 122. Breach of promise of marriage not assignable, 25.

By-Bidders. See *Puffers*.

By-Laws of Corporations. What they are, power to make how given, and nature of, 161.

Capital Invested in a Partnership. Ownership of, 142.

Capital Stock. See *Stock*.

Carrier. See *Common Carriers*.

Cashier's Check. See *Certificate of Deposit*.

Caveat Emptor. Meaning of, to what cases applied, 117.

Certificate. Clerk's, 255.

Certificate of Deposit. What it is, and when used, 75, 76.

Certificate of Stock. What it is, and form of, 164. Of what it is evidence, 164.

Certification of Checks. See *Checks*.

Change of Possession of Thing Sold. See *Delivery of Title of Thing Sold*.

Charter. How corporations are formed by, nature of, and how amended, 157.

Chartered Ship. When so called, 199.

Charterer of Vessel. Definition of, 198.

Charter Party. See *Shipping*.

Chattel Note. Nature and use of, 80.

Chattels, Real and Personal. Definition and examples of, 11, 12.

Checks. General form of, how distinguished from drafts, and when payable, 73, 74. Post-dated checks, why used, and when payable, 74. Days of grace not allowed on checks, 74. Definition of check, how great their use, 74. Parties to a check, 74. Danger in checks payable to bearer, 74. Forged indorsement or signature makes bank the loser, if check is paid, 74. Transfer of checks, 74. When holder of check has right of recovery against bank, 74. Liabilities of parties without certification, 75. Reason for certification, and method of, 75. Effect on checks of certification, 75. Cashier's check or certificate of deposit, 75.

Children. Duties of to parents, 235.

Choses in Action. See *Things in Action*.

Choses in Possession. See *Things in Possession*.

Churches. How vote for officers, 161.

Civil Corporations. Those included under, how divided, 156.

Civil Law. Foundation of Louisiana law, 9.

Civil Remedy. How used, 42.

Coach. Delivery of carrier by, 193.

Collateral Acceptance of a bill, what it is, 93.

Collateral Promise. Nature of, and when valid, 35.

Collateral Security. Law of, in merger, 51. Is released by tender of amount due, 53.

Collection. Guaranty of (see *Guaranty and Suretyship*).

Combinations to raise price of goods or labor are illegal, 29.

Commercial Law. Rules constituting it, 8.

Commission. See *Bailments*.

Common Carriers. Definition of, and conditions necessary for being such, 190. Duty as to what goods he shall receive, 190. Liability of, his responsibility concerning their safety, when excusable for loss or injury of goods, 190. Presumptions all against carrier, except in case of loss from natural causes, 191. Liability, how limited, rules in different States, when limited by general notice, 191. Duty in respect to property, as to loading, observing owner's instructions, route taken, and delay of a second carrier, 191. Delivery by carrier, how and where must be done, rule as to misdelivery, 193. Carrier's charges, rules as to amount of, and time of demand, 193. Rule where goods must pass over routes of two or more carriers, 193. Carrier's lien, nature of, 194. Carriage of live stock, responsibilities of carrier, 194. Carrier of passengers, whom bound to carry, 194. Rights in regard to prescribing rules for manner of receiving passengers, for tickets, etc., 194. Rules concerning baggage, 194. Liability of carrier of passengers, how he is bound by law, 195. Care required of railroad companies, 195. Negligence, laws concerning, 195.

Common Law. Definition and origin of, 7, 8. Relative authority of, 9. Fundamental law of land, 9.

Community of Profits, or sharing of profits, most important condition of a partnership, 142. First test in determining existence of a partnership, 142. Distinction arising in regard to it, 142. Final test of partnership, 142. Law of division where no agreement exists, 142. Different divisions made in agreements, 142.

Compensation for Breach of Contract. See *Damages for Breach of Contract*.

Composition Deed. By whom made, and nature of, 51.

Compound Interest. Laws concerning, 228.

Concealed Partner. Purpose in becoming one, liability of, 143.

Concealment of Facts. With evil design, law as to fraudulency of, 31. Mere omissions in case of insurance, 206. Concealment in cases of marine insurance, 220.

Conditional Promise. Sufficient for direct promise, illustration, 25. When it becomes binding, 25.

Conditional Sales of Personal Property. See *Sales of Personal Property*.

Conditions Precedent. Definition and examples of, 38. When held to have been waived, 39.

Congress. Acts of, second in authority as law, 9.

Consanguinity. See *Marriage*.

Consent. See *Assent*.

Consequential Damages. See *Remote Damages*.

- Consideration.** Nature, necessity and kinds, 23, 24. Good consideration, what it is, when sufficient, and when not, 24. Valuable consideration, is a benefit to promisor, and loss or inconvenience to promisee, and is always valid, 24. Consideration is invalid when based upon gratuitous promise, or when act or thing is illegal or impossible, 26. Executed consideration, definition of, when it supports a promise, 26. Failure of consideration, total, avoids a contract, 27. Law as to partial failure of consideration, 27. Inadequacy of consideration merely will not avoid a contract, theory of, 27. Necessity of in negotiable paper, 88. Failure of consideration a ground for rescission of sale, 122. Consideration in contract of guaranty (see *Guaranty*).
- Constitution of States.** In what cases highest law, 9.
- Constitution of United States.** Highest law of land, 9.
- Construction of Contracts.** Liberal as a rule, 39. Omissions supplied and repugnant clauses rejected, 39. Construction as to time of performance, 39. Custom of place followed in determining beginning of year, etc., 39. Law when no time is named, 39. Meaning of month and day, 40. Law concerning Sunday, 40.
- Constructive Delivery of things sold,** meaning of, 111. When necessary and how done, 111. When good as against third parties, 112.
- Continuing Guaranty.** See *Guaranty*.
- Contracts.** Great extent of, 14. Definition and divisions of, 14. Contract by specialty, what it is, and familiar examples of, 14. A specialty merges what security (see *Merger*). Parol contract, definition and extent of, 15. Written contract, how expressed, 15. Oral contract, definition and divisions of, 15. Express contract, definition of, 15. Implied contract, how generally applied, 15. Frequency of implied contracts, 15. Executed contract, a finished contract, 16. Executory contract, when executed, 16. Executory contracts include most of the practical questions of law, 16. Necessary conditions for validity, 16. Proposition, the imative of a contract, 21. When invalid (see *Subject-Matter of Contracts*). Contracts that must be in writing (see *Statute of Frauds*). Rules of interpretation (see *Interpretation of Contracts*). Entire and divisible contracts, 39. Construction of (see *Construction of Contracts*). Rescission of (see *Rescission of Contracts*). Subject-matter of (see *Subject-Matter of Contracts*). Contract of indorser (see *Indorser*). Contracts for sale of personal property, 35.
- Copartnership.** See *Partnership*.
- Corporate Seal.** Use when necessary, and its effect, 158.
- Corporations.** Importance, number and object of, 155. Classes of business formerly confined to, 155. Recent additions to above classes, 155. Definition of, 20, 155. Corporation aggregate, definition of, 155. Sole corporations, definition of, where found, 156.
- Corporations Aggregate.** How defined, 155. Subdivisions of, 156. Religious corporations, for what purpose formed, and what called in England, 156. Lay corporations, what they include, and divisions of, 156. Eleemosynary, for charitable purposes, 156. Civil, what they include, how divided, 156. Public, why and by whom created, illustrations and powers of, 156. Corporate attributes of counties, towns and school districts, 156. Quasi corporations, why so called, 156. Private corporations, how founded, nature of, and illustrations, 156. How corporations are created, 157. Created by charter, how done, provisions of charter, and how it can be amended, 157. Created under a general statute, takes the place of what method, simplicity of, 157. Created by prescription or presumption, formed upon what presumption, 157. Powers of (see *Powers of Corporations*). By what law corporations are governed, 160. Rights of corporations in other States, 160. Where corporations are supposed to reside, and law as to removal to another State, 160. State statutes providing for transaction of business by foreign corporations, 160. Restrictions in case of religious corporations, and how they can make valid transfer of property, 160. When this restriction was made, and use of in this country, 160. Law concerning titles, 160. When title of real estate will revert to owner, 160. Corporations must act through officers, and according to what rules, 161. Directors how liable, agents how appointed, 161. Corporations may hold property as trustees with one restriction, 162. Can only contract within certain limits, 162. In what ways may contract, 162. Bank is bound by acts of officers, 162. Transfer and issue of stock by (see *Stock*). Liabilities of (see *Liabilities of Corporations*). Dissolution of (see *Dissolution of Corporations*).
- Corporators.** Rights of, 163. Signing subscription list binds to contract, 163. Rule concerning non-payment of installments, 164. When right of action is lost, 164. Liabilities of, 165.
- Counter-Claim.** See *Set-Off*.
- Counterfeit Money** does not discharge debt, 46.
- Course of Exchange.** Explanation of, 69.

- Course of Justice.** Contracts obstructive of, 29.
- Covenant.** Definition of, 37. Dependent covenant, how defined and why so called, 38. In dependent covenant, definition of, and illustrations, 38. In deeds, 244-246.
- Covenantee.** How defined, 37.
- Coverture.** Disability of, what it is, 19. Theory out of which law grew, 19. Modifications of law, 19.
- Credit** in sales of personal property, 114. How it affects relation of parties to each other and to thing sold, 114. Sales on installment plan, how credit is given, 114. Chance of fraud in such sales, 114. Statute concerning, as remedy, 114.
- Creditor.** Disability of, how it affects the running of Statute of Limitations, 56.
- Criminal Prosecution.** An agreement to hinder or stop void, 30.
- Criminal Remedy.** How used, 42.
- Damages for Breach of Contract,** 59-63. Not paid as a punishment, 59. What they depend largely upon, 59. General rule as to amount, 59. In contracts for payment of money, amount recovered, 60. In contracts for purchase of goods, amount recovered in case of failure of delivery, 60. Methods seller may adopt when buyer refuses to accept goods without cause, 60. In contracts for sale of lands, amount of damages given for failure to give good title, 60. In actions for service, damages given employee for being discharged without fault, 60, 61. Rule in contracts for freightage vessels, 61. Liquidated damages, how defined, 61. Difference between liquidated damages and penalty, 61. Tendency of courts in deciding between the two, 61. Remote damages, rule concerning, 61. Speculative or uncertain damages not allowed, 62. Law in case of gains capable of being definitely ascertained, 62. In actions of tort, general rule, 62. Law of wrongful taking and conversion of property, 62. Law as to actions of replevin, 62. Exemplary or vindictive damages, when and why allowed, 62. But one recovery upon an entire contract, 62.
- Date of Bills, Notes and Checks.** Should be date, but not essential to validity, 78. When omitted, how proved, 78. When used, is a material part, 78. In checks, date declares what, 78.
- Day.** Usual meaning, exceptions, 40.
- Days of Grace.** Meaning of, why so called, 87. Now a matter of right, 88. Effect on maturity of instruments, 88. Classes of negotiable paper not entitled to days of grace, 88. Laws of States concerning days of grace, 88.
- Death.** Terminates agency when, 135. Law as to terminating partnership, 141.
- Debtor.** How absence of affects outlawing of debt, 56.
- Decree of Court.** Dissolution of partnership by, 150.
- Deed.** Composition (see *Composition Deed*). Definition of, and names of parties, 244. Warranty deed, full covenant, 244, 245. Warranty deed, 245. Quit-claim deed, 246. Covenant against grantor, 246. Execution of, 247. Acknowledgement of, 247. Delivery of, 247. Trust deed, 253. Recording, 254.
- Defense of Infancy.** See *Infants*.
- Defenses.** Definition, and divisions of, 43.
- Delivery** of title of thing sold, definition of, 110. Without change of possession, illustration of, and when sufficient, 110. When fraudulent as to third parties, 110. General rule where two buy the same property through fraud of owner, 110, 111. Delivery with change of possession, what it means and what is called, 111. Rule as to place of possession, 111. When subject matter is to be delivered, the title passes when this is accomplished, 111. Rules where there is no definite time for delivery, and where there is, 111. Rule concerning goods ordered from a distance, 111. Constructive delivery, when used, and how done, 111. When good against third parties, 112. Of real estate conveyances, 247, 254. In escrow, 248.
- Delivery by Common Carriers.** Rules of, 193.
- Demand.** Same as presentment for payment, 95.
- Demurrage.** How defined, 193.
- Dependent Covenants.** See *Covenants*.
- Deposit, Depositor, and Depositary.** See *Bailments*.
- Detention.** How used in marine insurance, 218.
- Directors** of a corporation, liability of, 161. Length of term of office of, 162.
- Disability** of persons to make contracts, natural and legal, 17. Of coverture (see *Coverture*). Of creditor, how it affects the running of Statute of Limitations, 56.
- Disaffirmance** of contracts made while infants, after coming of age, 18.

Discharge of Mortgage. See *Mortgage*.

Discount. How bank notes are discounted, 71.

Disfranchisement. What it means, and when can be resorted to by corporations, 162.

Dishonored Bills. Meaning of, what must be done in case of, 94.

Dissolution of Agency. Ways of doing, 133. By limitation, express and implied, 133. By direct act of parties, 133. When principal may revoke, and how far his revocation reaches, 133, 134. When revocation takes effect as to agent, and as to third parties, 134. Form of revocation, 134. In case agent's authority is coupled with an interest, 134. Renunciation of agent, when and how done, 134. Dissolution by change in condition of parties, 134. Rule in regard to bankruptcy of either party, 134. Rule in regard to incompetency, 134. Marriage of woman dissolves, common law concerning, and modifications, 134, 135. Death of either party terminates agency, and from what time termination dates, 135. One exception to last rule, 135.

Dissolution of Corporations, 166. By limitation, time of duration how limited, 166. By act of legislature, public corporations may be modified or dissolved, 166. Rights of third parties, 166. When private corporations may be dissolved by act of legislature, 166. By surrender of rights to state government, private corporations so dissolved, 166. When such dissolution is complete, 166. By forfeiture of franchise, how done, and how determined, 166. Effect of dissolution, receiver and his duties, 166.

Dissolution of Partnership, 149-152. How and for what cause can be had, 149. In what ways may take place, 149. Dissolution by agreement of all parties, the common method, 149. Agreement for dissolution in contract, either written in contract or understood by partners, 149. Subsequent agreement for dissolution may be made by partners, 149. Implied agreement for dissolution, in what cases, 149. Dissolution by act of one partner, 149. By assigning partnership interest, 149. By renunciation, express or tacit, 150. When it can be done legally, 150. Dissolution by decree of court, when resorted to, 150. Legal grounds for decree, 150. Dissolution by operation of law, what events operate as such, 150, 151. Results of dissolution, pertain to what, 151. Effect upon relations to each other, power to bind each other ceases, 151. Firm name or assets cannot be used for new business, 151. Rule when certain events cause dissolution, 151. Effect upon relations with outside parties, 151. Law as to notice given, 151. When notice is not necessary, 151. Administration of assets, law concerning, 152. Powers of partners after dissolution, 152. Appointment usually made, assets how applied, and disposition of surplus, 152.

Diverse Civil Conditions. Affecting right to contract marriage, 232.

Divisible Contracts. Nature of, 39.

Divorce. Definition, and kinds of, 236. Grounds for, 236.

Domestic Bill of Exchange. Definition and form of, 65. Name generally given it, 65. Law of protest of, 100, 101. Notice of non-payment of, 101.

Domestic Relations. Law of defined, how divided, 230.

Dormant Partner. See *Partners*.

Doubtful Terms. How interpreted in contracts, 37.

Dower. Widow's right of, 241.

Draft. See *Domestic Bill of Exchange*. Non-negotiable drafts, 79.

Drawer and Drawee. Explanation of, 65.

Drawee's Contract. Four divisions of, 91. Similar to that of indorser, 91. Implied agreement as to notice to drawer, 91. Contract as to place of finding drawee, 91. Drawee's contract calls for unconditional acceptance of bill, 92.

Drunken Persons. When intoxication invalidates contract, 17. Law as to partial intoxication, 18. Law as to habitual drunkards, 18. Law concerning contracts for necessities, 18. Cannot contract marriage, 231.

Duration of Partnership. How governed, 141.

Duress. Meaning of, effect on contracts, 22.

Easement. Meaning and use of term, 242.

Ecclesiastical Corporations. Name used in England for religious corporations, 156.

Effect of Illegality. Renders contracts void, 28.

Effects. Term how used, 11.

Eleemosynary Corporations. For what formed, 156.

Emblements. See *Landlord and Tenant*.

Eminent Domain. Right of, 239.

Entire Contracts. Definition and example of, 39.

Escheat. Meaning of, 240.

Estates in land. See *Real Property*.

Exclusion of Partner. From just share in management of business, ground for dissolution of partnership, 150.

Executed Consideration. Nature of, 26.

Executed and Executory Contracts. Definition of, 16. Disaffirmance of, when made while infants, 18.

Execution. What it is, and when used, 42. Of real estate conveyances, 247, 254.

Executor as Indorser. Power of, 81.

Executory and Executed Sales of Personal Property, 109.

Exemplary Damages. On what ground allowed, 62.

Express Company. Rule of delivery by, 193.

Express Contract. Definition and example of, 15.

Extent of Contracts. How great, 14.

Fabrication of Evidence. Agreement for, 30.

Failure of Consideration. Law where consideration totally fails, 27. How partial failure is proved, 27. Ground for rescission of sale of personal property, 122.

False Representations. Law when made by buyer, 31. Law when made by seller, 122.

Fee Simple. What it is, 239.

Feud. Meaning and use of term, 239.

Feudal System. Origin of, 239.

Fire Insurance, 209, 216. Definition of, and rights sometimes reserved, 209. Insurable interest, how many may insure same property, 209. Total amount of insurance, how restricted, 209. Policy, what it contains, how interpreted and enforced, 210. Risk, what it is ordinarily, added clauses, 210. Rule as to negligence of owner of property, 210. Clauses excepting certain liabilities, 210. Change of risk, what changes in building, its surroundings or occupancy avoids the contract, 211. Changes in case of personal property, 211. Amount insured, the maximum, insurance how far a protection, 211. Rule as to appraising buildings before insurance, 211. As concerning personal property, 211. Insurance in other companies, why done, 211. Sum each company must pay, 211. From whom owner may collect, 212. Time insurance is to continue, how specified, and usual length, renewal of policy, 213. Surrender of policies, when allowed, and amount repaid, 213. Premium, definition of, 213. Rule governing amount of, 213. Representations, when fraudulent, effect of, 214. Rule concerning omissions, 214. Warranties, how differ from representations, 214. Where written, and nature of, 214. Conditions, usual number of, how construed, 214. Assignment of policy or property, effect of, 215. How transferred, 215. Rule in case of mortgaging premises, 215. Reinsurance, why done, rules concerning, 215. Loss, in what ways caused, 215. Rule as to negligence, 215. When there is fraud, 216. Rule as to owner's duty in saving property, 216. Adjustment of loss, rules of, 216. Proceedings on adjustment, 216.

Firm. Definition of, 137. Name of, how fixed, 141.

Fixtures. See *Landlord and Tenant*.

Foreclosure of Mortgage. See *Mortgage*.

Foreign Bill of Exchange. Origin of use, 64. Definition and explanation of, 65, 67. How transferred, 66. In what currency payable, 68. Law of protest of, 101.

Forged Negotiable Paper. Used in payment, 46. Forged checks and indorsements, law of, 74.

Forwarders. What they are, duties and liabilities of, 187.

For Value. Meaning of, and law of, 89. "For value received" as used in guaranty, 169.

Fraud. Advantage law gives innocent party, 23. Prompt action necessary for one defrauded, 23. Fraudulent contracts voidable, 23. Definition of, 30. Contracts fraudulent upon each of two parties, 31. Contracts fraudulent upon third parties, 32. Fraudulent assignments and sales, 33. Statute of Frauds, 33. Fraudulent delivery of things sold, 110. Fraud a ground for rescission of sale, 121, 122. Fraud of one partner binds other partners, 145. Fraudulent conduct of one partner, ground for dissolution of partnership, 150. Fraud practiced upon guarantor, 175. Fraudulent representations in obtaining policy of life insurance, 206. Fraudulent representations in application for a fire insurance, 214. Law in case insurer burns or attempts to burn his buildings, 216. Fraudulent statements as to amount of loss, 216.

Free Mason Lodges. As joint-stock companies, 154.

- Frequency of Implied Contracts**, 15.
- Fundamental Law of Land**. What it is, 9.
- Gambling**. Law as to sale of articles for, 122.
- Gaming**. Law of in some States, 30.
- General Agent**. See *Agent*.
- General Average**. See *Shipping*.
- General Lien**. What it is, 223.
- General Ship**. What it is, 199.
- Gifts**. Promises to make, law of, 24. Law as to promises to make presents, and giving of notes and checks as presents, 88.
- Good Consideration**. See *Consideration*.
- Goods**. Term, how used, 11.
- Good Will**. Explanation of, 12.
- Greenbacks**. See *Legal Tender*.
- Guarantor**. Party to guaranty, 168.
- Guaranty and Suretyship**, 168-176. Both terms defined the same, 168. How defined, 35, 168. Falls under Statute of Frauds, 168. Collateral to some principal contract, 168. Parties to, 168. What business engagements it includes, 168. Law concerning consideration, 169. Continuing guaranty, how long continues, 169. Intention should be distinctly stated, 170. Liability of guarantor determined by terms of contract, 170. Notice of acceptance, when necessary, 170. Relation between principal and collateral contract, 170. When surety is bound by guaranty of illegal contract, and when not, 170. Guaranty of payment much used, what it binds guarantor to do, 170. Rules as to notice of non-payment, 170. Guaranty of collection, how differs from guaranty of payment, 171. Necessity placed upon creditor, 171. Amount recovered from guarantor by creditor, 171. When suit is not necessary, 171. Expressions that are in effect guaranties of collection, 171. Creditors' rights against guarantor, 172. Surety's or guarantor's rights (see *Surety*). One partner cannot bind another by, 146.
- Guardian and Ward**. Relation of, 235. Classes of guardians, 235, 236.
- Guest**. Definition of, 189.
- Habitual Drunkard**. Law concerning, 18.
- Highways**. Law regarding ownership and use, 242.
- Hire of things, of services, of custody, of carriage**. See *Bailments*.
- Hirer**. Definition of, 185.
- Hotel**. See *Innkeepers*.
- House**. See *Firm*.
- Husband**. Duties and liabilities of, 234.
- Idiots**. Law concerning incompetency of, 17. Cannot contract marriage, 231.
- Illegality of Subject-Matter**. Effect of, on contracts, and cases when illegal, 28. Ground for rescission of sale, 122. In case of marine insurance, 218.
- Illness**. When it will excuse performance of contract, 44. When ground for dissolution of partnership, 150.
- Immoral Life**. Law as to agreements concerning, 30.
- Implication**. Partnerships formed by, 140.
- Implied Assent**. When law recognizes it, 22.
- Implied Contracts**. Definition and frequency of, 15.
- Imprisonment for Debt**. When and where allowed, 42.
- Inadequacy of Consideration**. Will not avoid a contract, 27.
- Incompetency**. Terminates agency, 134. Ground for dissolution of partnership, 150.
- Incompetent Persons**. Law of, and classes, 17. Cannot make contracts of sale, 105.
- Independent Covenants**. Description of, 38.
- Indorsee**. Definition of, 66, 70. Rights and requirements of, 86.
- Indorsement**. Indorsement in blank, how done, and how transformed into an indorsement in full, 82. Indorsement in full, how done, and safety of, 82. Indorsement without recourse, conveys title, but avoids liability, 83. Restrictive indorsement, why used, 83. Forms of indorsement for collection without transfer of title, 83. Implication of indorsement, 84.

- Indorser.** Description of, 66, 70. Conditions on which indorser is bound to pay, 82. Contract in case of bill of exchange, 82. Indorser's contract, in case of one or several indorsers, 84. Rule when instrument is illegal, 84. Liability differs in different States, 84. Rule where indorser takes up note, as regards subsequent indorsers, 84. Law as to right of contribution, 175.
- Infants.** Legally defined, incompetency of, 18. When become of age, exception in case of females, 18. Ratification of contracts made while infants, 18. Disaffirmance of contracts, time given for, 18. Defense of infancy, cannot be bound, but can bind adults, 19. Rule as to necessities, 19. Liable for wrong doing, 19. Infants as indorsers, liability of, 81. Infants as agents, powers of, 124. When can contract marriage, 231.
- Injunction.** What it is, and when used, 42.
- Inland Bill of Exchange.** See *Domestic Bill of Exchange*.
- Inn.** See *Innkeepers*.
- Innkeepers.** What they are, what constitutes them such, 189. Duties of, as to whom they shall receive, 189. Guest, what constitutes one, 189. Boarder, when considered so, 189. Liability of landlord as to property of guest, 189. Rules concerning delivery of property to landlord, 189. Landlord's lien, what property it covers, 190. Boarding houses, how differ from hotels, 190.
- Insolvency.** Concealment of, 31. Contracts perversive of insolvent laws, 32. Insolvency of buyer in case of a stoppage in transitu, 119.
- Installment Plan.** Used in sales of property, 114.
- Insurable Interest.** Importance of, 205. What constitutes it in case of life insurance, 206. In fire insurance, 209. In marine insurance, 217.
- Insurance.** Definition of, 205. Definition of terms used, 205. Theory of, 205. Insurable interest, necessity of, 205. Does not require actual ownership, 205. Subdivisions of, 205. Life insurance (see *Life Insurance*). Fire insurance (see *Fire Insurance*). Marine insurance (see *Marine Insurance*).
- Insurer and Insured.** See *Insurance*.
- Intemperance.** See *Drunken Persons*. Ground for dissolution of partnership, 150.
- Intention of Parties.** Rule of interpretation, 37. When doubtful, how law decides, 37.
- Interest and Usury, 226-228.** Definition of interest and associate terms, 226. Legal rate, meaning of, 226. Rule as to higher rates, 226. Maximum rate, 226. On what allowed, classes of claims, 226, 227. Usury, what it means, former meaning, 227. Laws of different States, 227. Nature of usurious contracts, 227. Compound interest, what it is, laws concerning, 228. Other payments, not usurious, payment of interest in advance, 228. Payment for services in making and securing loans, 228. Loans, the repayment of which depends upon the happening of some uncertain event, 228. Sale of securities for less than face, 228. Effects of usury, penalties suffered in different States by those taking usury, 228. Effect on subsequent securities, 228.
- Interpretation of Contracts, 36-40.** Intention of parties, how interpreted, 37. Variations between writing and printing, 37. Doubtful terms, how interpreted, 37. Technical words, how understood, 37. Usage and custom determine interpretations, 37. Writings that are to be construed together, 37. Dependent and independent covenants (see *Covenants*). Conditions precedent, how described, 38. Entire and divisible contracts (see *Contracts*). Liberal construction always given, 39. Construction as to time of performance, 39. Rules as to law of place, 40.
- Invalid Consideration.** See *Consideration*.
- Issue of Stock.** See *Stock*.
- Jointly and Severally.** How used, 72.
- Joint Owners.** What they are, 142. Of real property, 242.
- Joint Stock Companies.** Why formed, how considered in law, and how they differ from ordinary partnerships, 153. Why not so common as formerly, 153. In what cases adopted, and how formed, 154. Articles of agreement, provisions in, 154. Liability of stockholders (see *Stockholders*). Intermediate stage, in what development, 154. Business, how conducted, and by whom, 154. Rights of stockholders, 154. Voluntary clubs as joint stock companies, 154.
- Joint Tenants.** What they are, 142. Right of survivorship, 142.
- Judgment.** What it is, 42. When merges lower security (see *Merger*).
- Landlord.** See *Innkeepers*.
- Landlord and Tenant.** Law of, 258-261. Definition of terms, rent, lien, etc., 258. Lessor's rights, 259. Lessee's rights, 260. Distress for rent, 259. Emblements, 260. Fixtures, 261. Recovering possession, 261.

- Law.** Definition of, 7. Municipal law, how defined, 7. Body of municipal law, 9. Universality and supremacy of law, 7. Sources of law, 7. What constitutes body of law, 7. Common law, origin of, 7. Unwritten law, same as common, 8. Statute law, how defined, 8. Written law, same as statute, 8. Commercial law, what constitutes it, 8. Uniformity of law in United States, and how explained, 8. States independent of each other as to laws, 8. What is the fundamental law of States, 9. Louisiana law founded on Roman law, 9. Relative authority of laws, 9. Constitution of United States the highest, 9. Acts of Congress second, 9. Constitution of each State, how it ranks, 9. Statutes passed by Legislature, rank of, 9. Common law last in authority, 9. Common law the fundamental law of land, 9. Law of property, definition and extent of, 9.
- Law Merchant.** What it is, 86.
- Lay Corporations.** What they include, 156.
- Lease.** Meaning and use of term, 258. Term or duration of, 259.
- Legal Capacity** of parties to a contract, 17.
- Legal Tender.** Definition and kinds of, 46.
- Letter.** Letter of credit, what it is and how used, 93. Offers made by letter, 106. Agents appointed by letter, 124. Authority of agent proved by letter, 125.
- Letter or Letter to Hire.** Definition of, 185.
- Liabilities** of principal (see *Principal*). Liabilities of agent (see *Agent*). Liabilities of corporations, cannot be punished as a criminal, 165. May be convicted of misdemeanor and punished by fine, 165. Liable civilly for damages, and for unskillfulness and negligence of agents, 165. Liable to taxation at places of residence, 165. Liability of common carriers (see *Common Carriers*).
- Libel.** Actions for, not assignable, 25.
- Liberal Construction.** Usual in contracts, 39.
- Lien.** Definition of, and necessary condition for, 223. To whom debt must be due, 223. How created, three different ways, 223. Kinds of liens, 223. A general lien, what it is, and to whom particularly belongs, 224. A special or particular lien, what it is, 223. Persons entitled to liens, general and special classes, 224. Right of lien, how waived, 224. Enforcement of lien, provisions for, 224. Agent's right of lien, 133. In hire of custody, those having right of lien, 187. Landlord's right of lien, 190. Carrier's lien, 193.
- Life Insurance.** Definition of, and parties to contract, 205. Methods of insuring, 205, 207. Insurable interest, what constitutes it, 206. Fraud of insured, effect of, 206. Concealment of facts by insured, effect of, 206. Conditions, rule as to following them, 206. Law as to suicide, 207. Assignment of policies, rules concerning, 207. Accident insurance, its importance, and nature of its policy, 207. By what companies done, 207. Methods of paying indemnity, 207. Amount of indemnity in different companies, 207. Injuries, what are included under, 208. Law as to total disability, 208. Notice of death or injury, time of, 208.
- Land Contract.** Use of, 254.
- Limitation.** Express and implied, dissolution of agency by, 133. Statute of Limitations (see *Statute of Limitations*).
- Limited Divorce.** What it is, 236.
- Limited Partner.** See *Partners*.
- Limited Partnership.** What it is, and where possible, 148. Its distinctive feature, 148. How formed, 148. Certificate of agreement, how made and contents of, 148. Terms must be published in some States, 148. Rule as to following terms of statute, 148.
- Liquidated Damages.** See *Damages*.
- Live Stock.** Rules as to carriage of, 194.
- Loans.** Payment for making and securing, 228.
- Lobbyists.** Contracts for services of, 29.
- Loss.** Included in nearly all contracts, 25. Loss of negotiable paper (see *Negotiable Paper*). Loss of property while undergoing repairs or in process of manufacture, law concerning, 186.
- Lost Property.** Law as to one finding it, 177.
- Lotteries.** Law concerning in some States, 30.
- Louisiana.** Foundation of its law, 9.
- Lucid Intervals.** What they are, contracts made during, 17.
- Lunatics.** Law as to being bound by contract, 17. Their contracts void or voidable, 17. The exception in case of necessities, 17. Cannot contract marriage, 231.

- Mandate, Mandator and Mandatory.** See *Bailments*.
- Manner of Making Payment.** See *Payment*.
- Manner of Performance.** See *Performance*.
- Maritime Loans.** See *Shipping*.
- Marine Insurance, 217, 221.** Definition of, and parties to contract of, 217. Insurable interest, necessity and nature of, 216. The property insured, what it includes and how must be described, 218. Rule as to legality of subject-matter, 218. The risk, what dangers it includes, 218. What duration of risk depends upon, 218, 219. Rule as to deviation from course, 219. Amount insured, valued and open policies, 219. Assignment of thing insured, how done without affecting insurance, 219. Warranties, what they are, kinds of, etc., 220. Implied warranties, what they embrace, 220. Effect of breach of warranty, 220. Disclosure and concealment of facts, 220. Abandonment, how defined, when insured has right of, its object, etc., 220. Adjustment, by whom and where done, 220. Return of premium, when it may be done, 221.
- Marriage.** Mutual promises of, support each other, 25. Contracts in restraint of, how considered, 28. Marriage brokerage contracts void, 29. Promises in consideration of marriage, when void, and when valid, 35. Law of, in agency, when party is a woman, 134, 135. Treated as a contract, 230. Necessary conditions of, 230. Legal capacity of parties, 230. Persons incompetent to contract marriage, 231. Natural disabilities, idiocy, lunacy and drunkenness, 231. Legal disabilities, consanguinity, affinity, infancy, 231. Physical incapacity, prior marriage, diverse civil conditions, 232. Annulment of, 237.
- Married Women.** Common law concerning, or disability of coverture, 19. Modification of common law, 19. Notes made by, and payable to, 81.
- Master and Servant.** Law of, 237.
- Material Alterations.** See *Alterations*.
- Maturity of bills, notes and checks, law of, 78.** Rights of purchaser of negotiable paper before and after maturity, 86.
- Meaning of Words as fixed by statute, 39.**
- Merger.** What it means, 51.
- Minors.** See *Infants*.
- Miscegenation.** Law concerning, 232.
- Mistake.** Not much allowance for, 23. Mutual mistake avoids contract, 23. Mutual mistake ground for rescission of sale, 121. Rules in case of mistake of one party in sales of property, 121, 122.
- Misuser.** What it means, 166.
- Month.** Meaning how fixed, usual construction, 40. How used in computing maturity of bills and notes, 97.
- Moral Obligation.** When sustains contracts, and when not sufficient, 26.
- Mortgage.** Definition of, and parties to, 248. Interest, insurance, tax and assessment clauses, 249, 250. The mortgage debt, 251. Sale of mortgaged premises, 252. Assignment of, 252. Discharge of, 253. Foreclosure of, 253. Deed of trust, 253. Execution and delivery of, 254. Subsequent mortgages, 254. Recording of, 254.
- Municipal Law.** See *Law*.
- Mutual Assent.** See *Assent*.
- Mutual Promises.** Law of, when made, 25. When one is valid consideration for another, 25.
- National Bank Bills or National Currency.** How and when used, 46.
- Nature and Necessity of Consideration, 23.**
- Necessaries.** Law of in case of lunatics, 17. Law of in case of drunken persons, 18. Law of and how determined in case of infants, 19.
- Necessary Conditions to validity of contract, 16.** In negotiable paper (see *Negotiable Paper*).
- Negligence.** Laws concerning in bailments, 179. In case of common carriers, 195. In case of fire, insurer's liability, 214.
- Negotiable Paper.** Necessity for, and kinds of, 64. Necessary conditions, law as to being written, 77. Rule as to signature, 77. Payee must be pointed out with certainty, 77. Must be payable in money, 77. Promise absolute as to time and amount, 77. Must be negotiable in form, meaning of negotiability of note, bill and check, 79. Place of payment, rules concerning, 79. Indorsement and transfer of, 81. Manner of transfer, 82. Time of transfer, 86. Loss of, when lost negotiable paper may be passed with good title, and when not, 87. Statutes providing for recovery of, 87. Law in case there is no statute, 87. Rule in case it is destroyed, 87. Consideration, 88. Presentment for pay-

- ment (see *Presentment for Payment*). Presentment for acceptance (see *Presentment for Acceptance*).
- Negotiable Words.** What they are, and why used, 79.
- New Promise** to pay outlawed claim, effect of, 57.
- Nominal Consideration** in contracts of guaranty, 169.
- Nominal Damages.** What they are, 60.
- Nominal Partner.** See *Partners*.
- Non-Acceptance** of drawee of bill, proceedings on, 94. When and by whom bill is protested, 94.
- Non-Negotiable Notes and Drafts.** When promissory notes are not negotiable, 79. Notes payable in certain things not negotiable, 79. Non-negotiable notes and drafts, how treated, 80. Indorsement of payee, 80. Indorsers of, liable without notice of non-payment, 103.
- Non-Payment of Notes and Bills.** Proceedings on, protest and notice of non-payment, 100, 101.
- Non-Performance.** General rule in regard to, 44. When justified, 44.
- Non-User.** What it means, 166.
- Note.** Used as payment, 47. Effect on original debt, 47. Note or draft of third party used as payment of debt, 47. Promissory notes (see *Promissory Notes*). Used as payment in sales of personal property, 113.
- Notice of Non-Payment** of notes and bills, 101. When necessary, 101. How given, must show what, 101. To whom and by whom made, 102. Time of service, and other incidents, 102. Waiver of notice, 103.
- Notice to Agent.** Rules concerning, 127.
- Obligation.** Moral (see *Moral Obligation*).
- Obscene Publications.** Laws of, 30, 123.
- Odd Fellow Lodges.** As joint-stock companies, 154.
- Offer by Letter.** Acceptance of, 22. Withdrawal of offer and acceptance, 106.
- Officers.** Public (see *Public Officers*). How chosen by corporations, 160. Law as to removal of by corporations, 162.
- Omissions.** When and by whom supplied, 39. When obtaining insurance policies, 205, 213.
- On Approval.** How used, 115.
- Open Policy.** What it is, 219.
- Oral Contract.** Definition of, 15.
- Oral Offer.** When should be accepted, 21.
- Order.** Term, how used, 66.
- Original Promise.** What it is, rules as to validity, 35.
- Origin of Law,** 7.
- Ostensible Partner.** See *Partners*.
- Outlawed.** See *Statute of Limitations*.
- Ownership of Capital Invested.** How owned in partnerships, 142, 143.
- Parents.** Duties to children, 234. Rights in regard to children, 234.
- Parol Contract.** How defined, and extent of, 15.
- Particular Lien.** What it is, 223.
- Parties to Contract.** Who may contract, 17. Persons incompetent to contract, 17. Rules as to intention of parties, 37.
- Partners.** Who may become, 143. Classes of partners, 143. Real or ostensible partner, nature of, 143. Dormant or concealed, purpose of so being, and when becomes liable, 143. Limited partner, where exists, and liability of, 143. Nominal partner, what constitutes one, and ground of his liability, 143. Power of partners, agents of firm, 144. Extent of power, how limited, 145. Acts that may be done by partners, as to debts of firm, representations, and negotiable paper, 145. Acts that may not be done by, two rules concerning, 145, 146. General limitations upon power of partners, 146. Rule as to partner making assignment, 146. Making contracts under seal, 146. Submitting matters to arbitration, 146. Effect of agreements between partners, 146. What agreements may be made, how binding as to themselves and third parties, 146. Remedy against one breaking agreement, 147. Where there is no agreement, what law assumes, 147. Law as to compensation for unusual services, 147. Purchaser entitled to what rights, 147. Law as to honest disagreements of partners, 147. Powers of partners after dissolution, 152. Signature of partner, how should be, 77. Power to transfer by indorsement, 82.

- Partnership**, 137, 152 How related to agency, and definition of, 137. In what ways formed, 137. Formed by written contract, in what cases and how, 137. Provisions for insertions in articles of copartnership, 138, 139. Formed by oral agreement, how done and how defects are supplied, 139. Rules as to respective rights, 139, 140. Formed by implication or by the acts of the parties, 140. When law presumes a copartnership, 140. Actual partnership by implication, 140. Partnership by implication as to third parties, 140. Firm name, how fixed, and what it may be, 141. Duration of partnership, how governed, 141. Law in case of death of partner, 141. Sharing of profits (see *Community of Profits*). Ownership of capital invested, usual rule, 142. Joint tenancy with right of survivorship, 142. Other methods of contributing capital, 143. Limited partnership (see *Limited Partnership*). Dissolution of (see *Dissolution of Partnership*).
- Part Payment**. When it constitutes accord and satisfaction, 50. Keeps a debt from outlawing, 57.
- Part Performance**. When there may be recovery for, and when not, 44. When it constitutes accord and satisfaction, 50. In case of hire of services, law of, 187.
- Party Wall**. What it is, 242.
- Passengers**. Rules as to carriage of (see *Common Carriers*).
- Payee**. Defined and example given, 65. Rule as to certain designation of, 77.
- Payment**. Made in what form, 46. Payment made in property, 46. Payment made by note, 47. Manner of making payment, when no place is named, where done, rule in case of litigation, creditor's instructions, 47. Presumption of (see *Presumption of Payment*). Application of payments when debtor owes several distinct debts to same creditor, 48. Where all debts are due, when payment is made, 48. When intention of debtor is known, 48. When intention is not known, 49. When neither party makes application, 49. Payment in part (see *Part Payment*). Payment of notes and bills, place of, 79. By whom and to whom made, 97. Time of payment, 98. Payment, how made, 98. Presentment for (see *Presentment for Payment*). Payment in sales of personal property, in what made, and when made, 112, 113. Made by note or check, 113. Tender of, what constitutes it, its effect, etc., 113. Guaranty of payment (see *Guaranty*).
- Per Centum**. Meaning and use of, 226.
- Penalty**. Definition of, how used, 61.
- Pendency of Another Action**. Only one suit can be brought at the same time for same cause of action, 52.
- Performance**. As a defense, 43. Manner of, must conform to conditions of contract, 43. When there is a choice, 43. Former rule, how modified, 43. Time of, non-performance, and part performance, 44.
- Perils of the Sea**. What the expression includes, 218.
- Personal Property**. Definition and examples of, 11. Kinds of, 11, 12. Used as payment of debt, 46. Sales of (see *Sales of Personal Property*).
- Physical Incapacity**. A bar to marriage, 232.
- Piracy and Theft**. How used in marine insurance, 218.
- Place**. Law of, in interpretation of contracts, 40. Place of tender of payment, rules of, 53. Place of payment of notes and bills, law of, 79. Place of presentment of bills for acceptance, 92. For payment, 96.
- Pledge, Pledgor, Pledgee**. See *Bailments*.
- Policy**. Definition of, 205. Contents of, in fire insurance, 210.
- Post Dated Checks**. Description and use of, 74.
- Potential Existence**. What it means, 106.
- Power of Attorney**. How conferred, 124. Rule as to its being recorded, 125. How acknowledged, and when necessary, 125.
- Powers in Liquidation**. For what used, 152.
- Powers of Agent**. See *Agent*.
- Powers of Corporations**, 157. Power to have succession, what is done in case of death or removal of officer, 157. Or sale of stock or death of stockholder, 158. When said to be immortal, 158. When it has no right of perpetual succession, 158. The right to sue and be sued, 158. Right to use common seal, when necessary, 158. Power to purchase and convey property how limited, amount of property that may be acquired how restricted, law where it exceeds powers, 158. Power to choose officers, mode of choosing directors, law in regard to votes, proxy to vote, 160. Rule as to voting in religious societies, 161. Power to make by-laws, what they are, and how usually given, for what they provide and by whom made, 161. When void, and how regulated, 161. Right to remove officers

(see *Amotion*). Right to expel members (see *Disfranchisement*). Power to hold property as trustees, 162. Power and mode of contracting, 162.

Powers of Partners. See *Partners*.

Premium. Definition of, and amount, 205, 213.

Prescription. Corporations created by, 157.

Presentment for Acceptance, of bills. When drawn payable a certain time after date, 92. When drawn payable at sight, 92. Reasonable time always given, 92. Law in regard to checks, 92. Must be within proper business hours, 92. Place of presentment, when indicated, 92. Law in case of removal of drawee, 92. When no place is mentioned, 93. By whom presented, 93.

Presentment for Payment. Of notes and bills, 95. Necessity of, and exceptions, 95. Rule when maker has removed to another state, 95. Proceedings in case of death of maker or acceptor, 95. When delay is excusable, 96. By whom presentment is made, 96. Where and to whom made, 96. Manner of making presentment, 96. Time of presentment, 96. Rules in computing time, 97. Days of grace, rules concerning, 97.

Presents. See *Gifts*.

Presumption of Payment. Circumstances raising it, 47. Possession by debtor of agreement to pay, 47. Possession of order or draft, 48. Possession of receipt, evidence of great weight, 48. Lapse of time, when sufficient, rule as to twenty years, 48. Subsequent dealings of parties often indicate payment, 48.

Price. Express and implied, 106. Amount necessary to bring sale within Statute of Frauds, 106, 107.

Primage. What it is, and why allowed, 201.

Principal. Definition of, and who may be one, 124. Suffers for fraudulent acts of agent, 126. How far bound by special agent, 126. Rule concerning notice to principal, 127. Liability of, in what two ways arises, 128. Liability arising out of contract, 128. Liability arising for wrongful act of agent, 128. Willful trespass of agent outside of authority not binding to principal, 128. Ratification of agent's acts by principal, by silence and by consent, by express words and by receiving benefit, 128, 129. Liabilities and rights of principal and agent as to each other, 131, 132. Revocation of agents' authority by principal, 133.

Principal. As used in connection with interest, 226.

Principal and Agent (see *Agency*). Relation between (see *Relation between Principal and Agent*).

Prior Marriage Undissolved. A bar to marriage, 232.

Private Corporations. What they are, 156.

Proceedings Supplementary to Execution. See *Execution*.

Promises. Mutual, nature of and when made, 25. When one is valid consideration for another, 25. Conditional promise, when sufficient, when binding, 25. Law when made before and after benefit enjoyed, or loss suffered (see *Executed Consideration*). Promises to answer for debt for another, 35. Original and collateral promises, 35. Promises in consideration of marriage, 35. When a satisfaction and when otherwise, 50. New promise to pay outlawed claim, 57.

Promissory Notes. How distinguished from drafts, 70. How defined and explained, 70. Negotiability and form of, 71. Made by two or more persons, liability of makers, 72.

Promissory Warranty. What it is, 219.

Profits. Sharing of in a partnership. See *Community of Profits*.

Property. Definition of, and divisions of, 11. Personal (see *Personal Property*). Real property, definition of, 12. Law of property, definition and extent of, 9. Tender of property, law of, 53.

Proposition. What it is, when takes effect, 21. Acceptance of proposition, nature of, 21. May be either written or oral, 21. Made by letter, when may be accepted, 22.

Protest. What it is, and how made, 100. Incidents relating to, 101. When it is necessary, and when not, 101.

Public Corporations. See *Corporations Aggregate*.

Public Officers. Contracts by, in violation of duty, bribery of, 30. How considered in law, 130. How liability differs from that of other agents, 130. Law concerning exercise of discretionary powers, 130.

Public Policy. Contracts against, 28.

Puffers. Definition of, and law concerning, 33.

Purchase Price. See *Price*.

Qualified Acceptance of Bills. Law of, 93.

Quantum Meruit. How defined, and how used, 44.

Quarreling of Partners. Ground for dissolution of partnership, 150.

Quasi Corporations. Description of, 156.

Quit-Claim Deed. See *Deed*.

Railroad Companies. Liability of in case of losses arising from delay, 191. Law as to delivery by, 193. Responsibility of, as to care of passengers, 195. Law in case of negligence, 195.

Raffling. Law concerning in some States, 30.

Ratification. Of contracts made while infants, 18. Of agent's acts by principal, 128.

Real Estate Conveyances. Law of, 244-256. Must be in writing and under seal, 244.

Real Partner. See *Partners*.

Real Property. Definition of, 12. Estates in, and ownership of, 239. Kinds of estates, 240. Widow's dower, 241.

Reasonable Time. As to performance of contracts, 40. As to presentment of bills and notes for acceptance, 92. As to presentment of bills and notes for payment, 96.

Receipt. Object of giving and taking, 48. How sometimes made, 48. Custom of taking receipts should be general, 48. Creditor's duty concerning giving receipt, 48. How it differs from a release, 51.

Receiver. Power to transfer by indorsement, 82. Duties of, 166.

Recording real estate conveyances, necessity and method of, 254. Requisites for, 255. Effect of, 255.

Recoupment. How defined, how it operates, 58. How compares with set-off, 58.

Registry. See *Recording*.

Reinsurance. How and why done, 214.

Relation between Principal and Agent, 131. How divided, 131. Principal liable for fulfillment of agreement, 131. Payment for services most important, 132. Principal liable for money advanced by agent, with interest, 132. Liable for damages suffered by agent without his fault, 132. Principal may require an accounting by agent at any time, 132. May countermand authority at pleasure unless agent has interest in business, 132. Principal may be indemnified by agent for loss or damages caused by him, 132. Agent's duties, how determined, 132. General duties owed by agent to principal, 132. Agent's duty in absence of instructions, 132. Cannot owe divided duty and act for both parties to a contract, 132. Rule as to gains and losses made or suffered by agent violating duty, 132. Agent liable to principal for what in general, 132. Compensation of agent, how determined, 133. When he may claim indemnity for damages, 133. Agent has right of lien, 133.

Relative Authority of Laws, 9.

Release. Description and use of, 51.

Release of Principal Debtor. Rules concerning, 98. Effect of extending time of payment, 98. Release of maker or acceptor, effect on other parties, 98.

Religious Corporations. For what purpose formed, 156.

Religious Societies. How vote for officers, 161.

Remedies. Definition and object of, 41. Civil and criminal, how defined, 42. Judgment, execution, and injunction, 42.

Remote Damages. Law of, 61.

Removal of Officers. See *Amotion*.

Rent. See *Landlord and Tenant* and *Lease*.

Renunciation. Of agent, method of terminating agency, 134. Dissolution of partnership by, 150.

Replevin. Actions of, how defined and used, 62.

Repugnant Clauses. When law rejects them, 39.

Rescission. Of contracts, when justified, 44. Of a sale, definition and grounds for, 121. Mutual mistake ground for rescission, and what it may concern, 121. Fraud a ground for, 121. Breach of warranty ground for, law when title has passed, and when not, 122. Failure of consideration, total and otherwise, 122. Illegality, when sale is illegal in purpose, when subject-matter is illegal, and when contract is illegal by statute, 122, 123.

Respondentia Bond. What it is, and how used, 200.

Restrictions of Corporations, 160.

Revocation. Of principal, terminates agency, 133. Of gratuitous loans, law of, 180.

Right of Contribution. What it means, 175. When it exists, 175. Form of contract does not affect liability of co-sureties to each other, 175. Rule in case of indorsers of commercial paper, 175.

Right of Lien. Meaning and use of, 133.

Right of Survivorship. What it is, 142.

Rights of Corporators. See *Corporators*.

Rights of Creditor Against Guarantor or Surety, 172.

Risk. In fire insurance, 210. In marine insurance, 218.

Sales of Personal Property, 105, 123. Definition of, and early methods of, 105. Necessary conditions as to parties, assent, consideration and subject-matter, 105, 106. Necessary conditions for sales of \$50 or more, as given by Statute of Frauds, 106, 107. Sales not within statute, 108. Performance of contract of sale, 109. Executory sales, what they are, 109. Executed sales, definition and explanation of, 109. Decisive test of completed sale, 110. Delivery of things sold (see *Delivery*). Payment in sales (see *Payment*). Conditional sales, defined and divisions given, 114. Sales on trial, or on approval, rules of, 114. Sales by sample, condition implied, when completed, 115. Sales of goods to arrive, condition, when absolute, 115. Warranty in sales (see *Warranty*). Rescission of (see *Rescission*).

Salvage. Definition of, 201.

Salvors. Who they are, 201.

Sample. Sale of goods by. See *Sales of Personal Property*.

Satisfaction. See *Accord and Satisfaction*.

Scrip. See *Stock*.

Seal. Description of, and origin of use, 14. Its signification as used now, 15. Corporate seal, laws of, 158.

Servant. See *Master and Servant*.

Service of Notice of Non-payment of Notes and Bills, 102.

Services. Hire of. See *Bailments*.

Set-off. What it is, and when allowed, 58.

Shares. See *Stock*.

Sharing of Profits. See *Community of Profits*.

Shipping. Contract for shipping or affreightment, definition of, 198. Parties to contract, 198. What the contract involves, 198. Ways of chartering a vessel, 198. Charter party, defined with reference to, first method of chartering vessel, 198. What it contains, demurrage, how defined, 198. Defined with reference to second method of chartering vessel, 198, 199. Difference between two forms, 199. Bill of lading, definition of, 199. Parties to contract, 199. Use of, to whom the three copies are given, and how used, 199. How transferred, 199. For what losses owner or charterer is responsible, 200. Maritime loans, what they are and why given, 200. Nature of loans, rate of interest, when due, etc., 200. Peculiarity of bottomry, and theory for, 200. General average, definition of, and cases it covers, 201. Nature of sacrifice, 201. Mode of adjusting the loss, 201. Salvage, what it is, amount of, etc., 201. How term "shipping" is used with reference to railroad transportation, 202.

Sight Draft. What it is and when payable, 65.

Signature. Law concerning in negotiable paper, 77.

Slander. Actions for not assignable, 25.

Smart Money. What it is, 62.

Sole Corporations. What they are, and where found, 156.

Sources of Law, 7.

Special Agent. See *Agent*.

Special Lien. Nature and use of, 223.

Specialty. What it is, 14. When it merges lower security. See *Merger*.

Speculative Damages. Law of, 62.

Spirituuous Liquors. Law as to sale of without license, 123.

State Laws. Independence of, 8.

- Statute.** Statute law, how defined, 8. Statute of Frauds, when and why enacted, 33. What it requires, and meaning of, 34. Part which affects sales of personal property, 106. Statute of Limitations, what it requires, why so-called, how operates on the claim, 55. When it begins to run, 55. Statutes concerning absence of debtor, 56. Statute in regard to giving possession, but not title, 114. Sales of personal property illegal by, 123. Corporations created under statute, 157.
- Stock.** What it is, and subscriber's interest, 164. How divided, and how issued, 164. Transfer of, same as any personal property, 164. Transfer, where made, and how, 165. When corporation itself may purchase shares, 165.
- Stockholders.** In joint-stock companies, liable same as partners, exceptions, 154. In corporations, liabilities of, 165.
- Stoppage in Transitu.** How defined, 118. Necessary conditions for, 118, 119. How right is exercised, 119.
- Streams.** Law governing use of, 242. Title to land under, 242.
- Strikes.** Law of, 29.
- Subject-matter of Contracts.** What it is, how limited, 28. Effect of illegality of, 28. Unlawful when against public policy, as when in restraint of marriage, as a marriage brokerage contract, 28. When in restraint of trade, 29. When perverse of acts of government, 29. Obstructive of course of justice, 29. Unlawful when immoral, as agreements to live immoral life, obscene publications, Sunday desecration, bets and wagers, 30. Unlawful when fraudulent upon each other, or upon third parties, 31, 33. Must exist, actually or potentially, in order to make contract of sale, 106. Of marine insurance as to legality, 218.
- Subrogation.** Most important right of surety, 173.
- Suicide.** How it affects an insurance policy, 207.
- Suit.** But one at same time for same cause of action is allowable (see *Pendency of Another Action*).
- Sunday.** Law concerning desecration of, 30. Law of in reckoning time of performance, 40.
- Suppression of Evidence.** Law of, 30.
- Supremacy of Law,** 7.
- Surety.** Definition of, 168. Rights against creditor, subrogative most important, 173. Rights against principal debtor, in case of default, when and what he may collect, 173. How discharged from liability, 173. By expiration of time, 173. By notice from guarantor, 174. By alteration of agreement when made without his knowledge or consent, 174. By giving time to principal, how given, rule as to taking collateral and new security, 174. By fraud practiced upon guarantor, 175. Court defines rights between sureties, what amount each must pay, right of contribution, 175. How "surety for the above names" and "surety" after name of surety affect his liability, 175.
- Suretyship.** See *Guaranty and Suretyship*.
- Surrender Value.** Meaning of, 213.
- Symbolic Delivery.** Meaning of, and when used, 181.
- Tavern.** See *Innkeepers*.
- Technical Words.** How interpreted in contracts, 37.
- Tenants in Common.** To what entitled, 142. Estate of, 242.
- Tender.** How defined, how far a defense, 53. How made, in what money made, 53. For what amount made, and effect on collateral securities, 53. Rule when made to one of several joint creditors, 53. Place of tender, 53. Tender of property, etc., 53. Tender of payment in contracts of sale, 113.
- Things in Action.** What they comprise, 12. Assignment of 25.
- Things in Possession.** Definition of, 12.
- Thing Sold.** Must have actual or potential existence, 106.
- Third Party or Person.** Who he is, 124.
- Time.** Important factor in assent, 21. Important element in mutual promises, 25. Construction of contracts as to time, 39. Time of performance of contracts, 44. Law concerning in bills, notes and checks, 78. Time of presentment of bill or note for acceptance, 92. Time of presentment for payment, 96. Time of service of notice of non-payment, 102. Time of delivery of thing sold, 111.
- Title.** Law of in negotiable paper in some instances, 86, 90. Of property purchased by corporations, 160.
- Tort.** meaning of damages in action of, 62.

- Trade.** Contracts in restraint of, 29.
- Transfer** of notes and bills. Who may transfer, 81. Manner of transfer, 82. Time of transfer, how affects purchaser's rights, 86. Transfer of stock. See *Stock*.
- Treasurer of Corporation.** Power of to transfer by indorsement, 81.
- Trial.** Sales of goods on, 114.
- Trustees.** Corporations acting as, 162. Power of to transfer by indorsement, 82.
- Uncertain Damages.** Law concerning, 62.
- Underwriter.** Definition of, 205.
- Uniformity of Law in United States.** How explained, 8.
- Universality of Law,** 7.
- Unlawful Subject-matter.** See *Subject-matter*.
- Unwritten Law.** Same as common law, 8.
- Usage and Custom** in interpreting contracts, 37.
- Usury.** illegality of usurious contracts, 89. See *Interest and Usury*.
- Valuable Consideration.** See *Consideration*.
- "Value Received."** When used, and how interpreted, 79.
- Valued Policy.** Definition of, 219.
- Variations** between writing and printing in contracts, which prevails, 37.
- Vendor and Vendee.** Meaning of 105.
- Vindictive Damages.** When allowed, 62.
- Violation of Articles of Copartnership.** Ground for dissolution of partnership, 150.
- Voluntary Clubs** as joint-stock companies, 154.
- Wagers.** Law concerning, 30.
- Ward.** See *Guardian and Ward*.
- Waiver of Notice.** What it is, and how done, 103.
- Warehouseman.** Duties, rights and liabilities of, 187.
- Warranty** in sales of personal property, how defined, 116. Divisions of, 117. Express warranty, definition of, how given, 117. Implied warranty of quality, law implied, 117. Implied warranty of title, what it is, effect of possession and non-possession, 118. Breach of warranty, ground for rescission of sale, 122. In cases of fire insurance, 214. In cases of marine insurance, 220.
- Warranty Deed.** See *Deed*.
- Wharfinger.** What he is, duties and rights of, 187.
- Widow.** Law as to making contracts, 19. Her right of dower, 241.
- Wife.** Rights and Disabilities of, 234.
- Withdrawal of Offers.** When may be, 106.
- Writing.** Negotiable paper should be in, what this means, 77.
- Writings Construed Together,** 37.
- Written Contracts.** What they are, 15.
- Written Law.** Same as statute, 8.

INDEX TO FORMS.

	PAGE.
Affidavit	275
Affidavit of execution of conveyance	255
Apprenticeship agreement	279
Apprenticeship release	279
Articles of copartnership	137, 139
Assignment of mortgage	252
Assignment of stock certificate	165
Award of arbitrator	277
Bank check	73
Bill of lading, land	269
Bill of lading, water	199
Bill of exchange, inland	65
Bill of exchange, foreign	67
Bill of sale	107
Blank indorsement	265
Bond of personal integrity	168
Bond, debt secured by mortgage	251
Building contract	276
Certificate of stock, or scrip	164
Certified check	75
Chattel note	264
Chattel mortgage	266
Circular letter of credit	273
Deed, full covenant	244
Deed, quit claim	246
Deed, covenant against grantor	247
Deposit ticket	267
Discharge of mortgage	253
Draft	65
Draft, accepted	66
Draft, to accompany bill of lading	270
Employment contract	277
Express C. O. D.	272
Freight receipt	271
Fast freight receipt	268
Freight bill	271
Full indorsement	265
Guaranty of faithful performance of duty	168
Guaranty, continuing	169
Guaranty of payment	170
Guaranty of collection	171
Inland bill of exchange	65
Indorsement, blank	265
Indorsement, full	66, 265
Indorsement, qualified	265
Indorsement, restricted	265

Judgment note.....	264
Land contract.....	275
Letter of credit, circular.....	278
Lease.....	258
Memorandum of sale.....	107
Mortgage, land.....	248
Mortgage, chattel.....	266
Mortgage, interest, insurance and tax clauses.....	249
Note, payable to bearer.....	70
Note, payable to order of payee.....	71
Note, joint.....	263
Note, joint and several.....	72, 263
Note, interest bearing.....	263
Note, non-interest bearing.....	263
Note, not negotiable.....	264
Note, demand.....	264
Note, chattel.....	264
Note, judgment.....	264
Note, negotiable, married woman clause.....	265
Notice of protest.....	101
Notice of dissolution of partnership.....	132
Notice of stoppage <i>in transitu</i>	119
Notice to tenant.....	261
Notice to landlord.....	261
Oath of office.....	278
Partnership agreement.....	137, 139
Power of attorney.....	124, 125
Protest for non-payment.....	100
Proof of claim.....	276
Proxy to vote for officers of corporations.....	161
Qualified indorsement.....	265
Restricted indorsement.....	265
Receipt, ordinary freight.....	267
Receipt, fast freight.....	268
Receipt, money.....	278
Release.....	277
Submission to arbitration.....	276
Subscription paper.....	278
Way bill.....	268
Waiver of protest.....	265
Will.....	280

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Author

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ATreatise on commercial

Title

law with forms of ordinary

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Date

Borrower's Name

